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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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AMERICAN DECISIONS.

VOL. XXXI.

The cases re-reported in this Volume will be found originally reported in the following State Reports:

MAINE REPORTS. - - - - -	Vol. 14.	1836-1837.
GILL & JOHNSON'S MARYLAND REPORTS.	Vol. 9.	1837-1838.
PICKERING'S MASSACHUSETTS REPORTS.	Vol. 19.	1837.
HOWARD'S MISSISSIPPI REPORTS. - -	Vol. 1.	1837.
MISSOURI REPORTS. - - - - -	Vols. 4, 5.	1837.
NEW HAMPSHIRE REPORTS. - - - -	Vols. 8, 9.	1837.
HARRISON'S NEW JERSEY REPORTS. -	Vol. 1.	1837.
GREEN'S NEW JERSEY CH. REPORTS. -	Vol. 3.	1837.
PAIGE'S NEW YORK CH. REPORTS. -	Vols. 6, 7.	1837.
WENDELL'S NEW YORK REPORTS. - -	Vols. 17, 18.	1837.
DEVEREUX & BATTLE'S N. C. EQ. REPS.	Vol. 1.	1837.
DEVEREUX & BATTLE'S N. C. LAW REPS.	Vol. 2.	1837.
OHIO REPORTS. - - - - -	Vol. 8.	1837.
WATTS' PENNSYLVANIA REPORTS. - -	Vol. 6.	1837.
WHARTON'S PENNSYLVANIA REPORTS. -	Vol. 3.	1837-1838.
DUDLEY'S S. CAROLINA LAW REPORTS.		1837-1838.
DUDLEY'S S. CAROLINA EQ. REPORTS. -		1837-1838.
YERGER'S TENNESSEE REPORTS. - -	Vol. 10.	1837.
VERMONT REPORTS. - - - - -	Vol. 9.	1837.
LEIGH'S VIRGINIA REPORTS. - - -	Vol. 8.	1836-1837.
PORTER'S ALABAMA REPORTS. - - -	Vols. 6, 7.	1838.
ARKANSAS REPORTS. - - - - -	Vol. 1.	1837-1838.
CONNECTICUT REPORTS. - - - - -	Vol. 12.	1838.
HARRINGTON'S DELAWARE REPORTS. -	Vol. 2.	1838.

AMERICAN DECISIONS.

VOL. XXXI.

CASES REPORTED

NAME.	SUBJECT.	REPORT.	PAGE.
Abbott v. Hutchins.....	<i>Attachment</i>	14 Maine.....	59
Adams v. Nichols.....	<i>Contracts</i>	19 Pickering.....	137
Adm'rs of Patton v. Magrath....	<i>Common carriers</i> ...	Dudley Law....	552
Alger v. Thacher.....	<i>Restraint of trade</i> ..	19 Pickering.....	119
Anderson v. Davis.....	<i>Statute of frauds</i> ...	9 Vermont.....	612
Andrews v. Morse.	<i>Attorney-at-law</i>	12 Connecticut....	752
Antonidas v. Walling.....	<i>Guardian and ward</i> . 3	Green Ch.....	248
Armstrong's Lessee v. McCoy....	<i>Sheriff's deed</i>	8 Ohio	435
Baird v. Baird's Heirs.....	<i>Co-tenancy</i>	1 Dev. & Bat. Eq.	399
Baxter v. Willey.....	<i>Mortgages</i>	9 Vermont.....	623
Beecher v. Parmele.....	<i>Boundaries</i>	9 Vermont.....	633
Bell v. Monahan.....	<i>Reversions</i>	Dudley Law....	548
Bloodgood v. Mohawk and Hud- son R. R. Co.....	} <i>Eminent domain</i> ...	18 Wendell.	313
Blymire v. Boistle.....		6 Watts.....	458
Bool v. Mix.....	<i>Devises</i>	17 Wendell.....	285
Boren v. McGehee.	<i>Assignm't of judg'ts</i> . 6	Porter.....	695
Brown v. Bonner.....	<i>Mistake</i>	8 Leigh	637
Brown v. McCormick.....	<i>Real estate</i>	6 Watts.....	450
Brown v. Wait.....	<i>Exemptions</i>	9 Pickering.....	154
Burleigh v. Bennett.....	<i>Guardian and ward</i> . 9	New Hampshire.	213
Callaway v. Alexander....	<i>Relief in equity</i>	8 Leigh.....	640
Carney v. Carney.....	<i>Executions</i>	10 Yerger.....	590
Champion v. Bostwick.....	<i>Partnership</i>	18 Wendell.....	376
Champlin v. Laytin.....	<i>Mistake of law</i>	18 Wendell.	382
Chapman v. Robertson.....	<i>Conflict of laws</i>	6 Paige Ch.....	264
Chase v. Merrimack Bank.....	<i>Executions</i>	19 Pickering.....	163
Chouteau v. Russell.....	<i>Vendor and vendee</i> . 4	Missouri.....	191
Cobb v. Haskell.....	<i>Fraud. conveyances</i> . 14	Maine.....	56
Cohen v. Charleston Fire and Marine Insurance Co.	} <i>Insurance</i>	Dudley Law...	549
Corey v. Corey.....		19 Pickering.....	117

NAME.	SUBJECT.	REPORT.	PAGE.
Crosby v. Fitch.....	<i>Common carriers.</i>	12 Connecticut....	745
Cummins v. Scott.....	<i>Conspiracy</i>	6 Watts	493
Cuthbert v. Kuhn.....	<i>Rent</i>	3 Wharton	513
Davenport v. Sleight.....	<i>Blank bond</i>	2 Dev. & Bat. Law.	420
Davis v. Bell.....	<i>Patents</i>	8 New Hampshire.	202
Davis v. Richardson.....	<i>Gifts</i>	10 Yerger.....	581
Denderick v. Cantrell.....	<i>Trusts and trustees</i>	10 Yerger.....	576
Devises of McCune v. House....	<i>Wills</i>	8 Ohio	438
Dixon v. Olmsted.....	<i>Illegal consideration.</i>	9 Vermont	629
Doe v. Executors of Dugan.....	<i>Remainders</i>	8 Ohio	432
Donham v. Wild.....	<i>Sheriffs</i>	19 Pickering.....	161
Doolittle v. Malcom.....	<i>Arbitrator and award</i>	8 Leigh.....	671
Dorrance v. Scott and Wife.....	<i>Married women</i>	3 Wharton	509
Driggs v. Dwight.....	<i>Landlord and tenant.</i>	17 Wendell	283
Dugan v. Cureton.....	<i>Misrepresentations.</i>	1 Arkansas	727
Eagle v. Eichelberger.....	<i>Fraudulent sales</i>	6 Watts.....	449
Eddy v. Traver et al.....	<i>Subrogation</i>	6 Paige Ch.....	261
Enfield v. Permit.....	<i>Legislative grants</i> ..	8 New Hampshire.	267
Fonville v. McNease.....	<i>Libel</i>	Dudley Law....	556
Fox v. Hoyt.....	<i>Justices' courts</i>	12 Connecticut....	760
French's Heirs v. French et al....	<i>Intoxication</i>	8 Ohio.....	441
Frost v. Spaulding.....	<i>Boundaries</i>	19 Pickering.....	150
Garret v. Rex.....	<i>Gifts</i>	6 Watts	447
Gibson v. Brockway.....	<i>Deeds</i>	8 New Hampshire.	200
Gibson v. Culver.....	<i>Common carriers</i>	17 Wendell.....	297
Gillaspie v. Wesson.....	<i>Agency</i>	7 Porter.....	715
Gilmore v. Whitesides.....	<i>Donatio causa mortis.</i>	Dudley Equity..	563
Glenn v. Bank of the U. S.....	<i>Husband and wife.</i>	8 Ohio.....	429
Greene v. Linton.....	<i>Part performance</i> ..	7 Porter.	707
Greeno v. Munson.....	<i>Vendor and vendee.</i>	9 Vermont.....	605
Griffis v. Sellars.....	<i>Probable cause.</i>	2 Dev. & Bat. Law.	422
Harding v. Springer.....	<i>Mortgages</i>	14 Maine.....	61
Haskins v. Young.....	<i>Arrest</i>	2 Dev. & Bat. Law.	426
Hays v. Miles.....	<i>Decedent's debts</i>	9 Gill & Johnson..	70
Hayward v. Sedgley.....	<i>Trespass</i>	14 Maine.....	64
Hill's Lessee v. West.....	<i>Mortgages</i>	8 Ohio.....	442
Hobbs v. Lowell.....	<i>Dedication</i>	19 Pickering.....	145
Holmes v. Burton.....	<i>Partnership</i>	9 Vermont	621
Hunt v. Smith.....	<i>Guaranty</i>	17 Wendell.....	296
James v. Bird's Adm'r.....	<i>Rescission</i>	8 Leigh.....	668
Jamison v. Jamison.....	<i>Married women</i> ..	3 Wharton.....	536
Jawett v. Lincoln.....	<i>Sales</i>	14 Maine.....	36
Kepner v. Keefer.....	<i>Sunday</i>	6 Watts.....	460
Kimbro v. Lytle.....	<i>Neg. instruments</i> ...	10 Yerger.....	585
Kinnaird v. Williams.....	<i>Legacies and legatees.</i>	8 Leigh.....	658
Kirksey v. Bates.....	<i>Notaries</i>	7 Porter.....	722

CASES REPORTED.

9

NAME.	SUBJECT.	REPORT.	PAGE.
Lane v. Berland.....	Conditional sales...	14 Maine.....	33
Lathrop v. Cook.....	Replevin.....	14 Maine.....	62
Lessee of Armstrong v. McCoy..	Sheriff's deed.....	8 Ohio.....	435
Loomis v. Terry.....	Ferocious animal...	17 Wendell.....	306
Lynch v. Commonwealth.....	Sheriff's sale.....	6 Watts.....	490
Mackinley v. McGregor.....	Husband and wife..	3 Wharton.....	522
Mackinley v. Hewitt.....			
Mahala v. State.....	Discharge of jury..	10 Yerger.....	591
Markham v. Brown.....	Indiscrepancy.....	8 New Hampshire.	209
Mason v. Bridge.....	Contracts.....	14 Maine.....	66
McClallen v. Adams.....	Agency.....	19 Pickering.....	140
McCune's Devises v. House....	Wills.....	8 Ohio.....	438
McLain v. State.....	Jury.....	10 Yerger.....	573
Mills v. Hoag.....	Pleading and proc..	7 Paige Ch.....	271
Morrow v. Campbell.....	Performance of cov't.	7 Porter.....	704
Mott v. Danforth.....	Conspiracy.....	6 Watts.....	468
Mullany v. Mullany.....	Curtsey.....	3 Green Ch.....	238
Newby v. Skinner.....	Estates of decedents.	1 Dev. & Bat. Eq.	397
Newhall v. Dunlap.....	Agency.....	14 Maine.....	45
Overseers of Alexandria v. } Overseers of Bethlehem }	Domicile.....	1 Harrison.....	229
Patterson v. Nichol.....	Stat. of limitations.	6 Watts.....	473
Patton's Adm'rs v. Magrath.....	Common carriers..	Dudley Law....	552
People v. Clough.....	False pretenses.....	17 Wendell.....	303
Peters v. Westborough.....	Statute of frauds...	19 Pickering.....	142
Proprietors of Enfield v. Permit..	Legislative grants...	8 New Hampshire.	207
Regents of the University of } Maryland v. Williams }	Corporations.....	9 Gill & Johnson..	72
Reid v. Edwards.....	Performance of cov't.	7 Porter.....	720
Rice v. Simmons.....	Libel.....	2 Harrington.....	766
Rix v. Adams and Throop.....	Consideration.....	9 Vermont.....	619
Roberts v. Adams.....	Contribution among } sureties.	6 Porter.....	694
Robinson v. Executors of Dart..	Husband and wife..	Dudley Equity..	569
Rosser v. Randolph.....	Nuisance.....	7 Porter.....	712
Shropshire v. Glascock.....	Gaming.....	4 Missouri.....	189
Skipwith, Ex'r, v. Cunningham..	Assignment.....	8 Leigh.....	642
Smith v. Benson.....	Co-tenancy.....	9 Vermont.....	614
Smith v. Bishop.....	Stat. of limitations..	9 Vermont.....	607
Smith v. Starr.....	Devises.....	3 Wharton.....	498
State v. Burnham.....	Libel.....	9 New Hampshire.	217
State v. Field.....	Criminal law.....	14 Maine.....	52
State v. Pendergrass.....	Schoolmaster.....	2 Dev. & Bat. Law.	416
State Treasurer v. Cross.....	Contracts.....	9 Vermont.....	626
Steele v. Williams.....	Reversions.....	Dudley Law....	546
Stetson v. Faxon.....	Nuisance.....	19 Pickering.....	123

NAME.	SUBJECT.	REPORT.	PAGE.
Stevens v. Head.....	<i>Patents</i>	9 Vermont.....	617
Stewart v. Kearney.....	<i>Trover</i>	6 Watts.....	482
Stoddard Woolen Manufactory v. Huntley.....	<i>Liens</i>	8 New Hampshire.	198
Stoever v. Rice.....	<i>Mortgages</i>	3 Wharton.....	495
Stone v. Patterson.....	<i>Landlord and tenant</i> .	19 Pickering.....	156
Sweet v. Jacobs.....	<i>Trusts and trustees</i> ..	6 Paige Ch.....	252
Tally v. Reynolds.....	<i>Attorney's authority</i> .	1 Arkansas.....	737
Tarbox v. Hays.....	<i>Judgments</i>	6 Watts.....	478
Thayer v. Boston.....	<i>Municipal corp'tions</i> .	19 Pickering.....	157
Thompson et al. v. Garwood et al.	<i>Devises</i>	3 Wharton.....	502
Thomson v. Winchester.....	<i>Patents</i>	19 Pickering.....	135
Titus v. Whitney.....	<i>Judgments</i>	1 Harrison.....	228
Town of Hinesburgh v. Sumner..	<i>Illegal consideration</i> .	9 Vermont.....	599
Tremper v. Hemphill.....	<i>Sureties</i>	8 Leigh.....	673
Trovillo v. Tilford.....	<i>Levy</i>	6 Watts.....	484
Tucker v. Williams.....	<i>Fraud. conveyances</i> .	Dudley Law. ..	561
Twelves v. Williams.....	<i>Executions</i>	3 Wharton.....	542
Union Bank of Georgetown v. Planters' B'k Prince George's Co. }	<i>Stat. of limitations</i> ..	9 Gill & Johnson..	113
Van Duzer v. Van Duzer.....	<i>Husband and wife</i> ..	6 Paige Ch.....	257
Van Rensselaer v. Clark.....	<i>Bona fide purchasers</i> .	17 Wendell.....	280
Van Steenburgh v. Tobias.....	<i>Pleading and prac.</i>	17 Wendell.....	310
Vick v. Mayor etc. of Vicksburg..	<i>Dedication</i>	1 Howard.....	167
Walker v. Quigg.....	<i>Devises</i>	6 Watts.....	452
Watkins v. Dean.....	<i>Wills</i>	10 Yerger.....	583
Watson v. Prop'rs Lisbon Bridge..	<i>Corporations</i>	14 Maine.....	49
Wells v. Smith.....	<i>Contracts</i>	7 Paige Ch.....	274
White v. Gay.....	<i>Boundaries</i>	9 New Hampshire.	224
White v. White.....	<i>Dower</i>	1 Harrison.....	232
Williams v. Maus.....	<i>Trusts and trustees</i> ..	6 Watts.....	465
Willis v. Hill.....	<i>Partnership</i>	2 Dev. & Bat. Law.	412
Wilson v. Woodruff.....	<i>Evidence</i>	5 Missouri.....	194
Winkley v. Hill.....	<i>Fraud. conveyances</i> ..	9 New Hampshire.	215
Woodbury v. Bowman.....	<i>Preferring creditors</i> .	14 Maine.....	40
Wyman v. Campbell.....	<i>Administrator's sale</i> .	6 Porter.....	677
Yeager v. Carpenter.....	<i>Justificat'n of officer</i> ..	8 Leigh.....	665
Young v. Glendenning.....	<i>Gifts</i>	6 Watts.....	492

CASES CITED.

	PAGE		PAGE
Abbott v. Broome	552	Attorney-general v. Nichol	715
Abbott v. Mackinley	535	Attorney-general v. Pearce.	89
Abbott v. Mills	132, 188	Attorney-general v. Utica Ins. Co.	712
Abbott v. Rice	758	Auchmuty v. Ham	312
Adams v. Freeman	212, 213	Austin v. Bell	655
Adams v. Hall	312	Austin v. Tawney.	278
Adams v. Hall and Cootwire....	312	Austin v. Taylor	246
Adams v. Paige	471	Austin's Adm'x v. Winston Ex'r	669
Adams v. Wiscasset Bank	164	Aymar v. Astor	747
Adamson v. Armitage	448	Aymar v. Bell	444
Adsit v. Adsit	665		
Agar v. Fairfax	185	Babb v. Clemson	61, 450
Agar v. Regents Canal Co.	337	Bacon v. Cobb	140
Aikenhead v. Bladen	212	Badger v. Williams	601
Albany F. L. Co. v. Bay	295	Bailey v. Greenleaf	544
Albany Street, <i>In re</i>	373	Bailey v. March	207, 208
Aldridge v. Tuscumbia R. R. Co.	373	Bailey v. Ogden	58
Alger v. Thacher	122	Baker v. Boston	132, 161
Alken v. Bolan	673	Baker v. Cook	757
Allen v. Holden	629	Baker v. Moore	127
Allen v. McKeen	90, 92, 105	Baker v. Scott	285
Allen v. Sayward	62	Baker v. Stackpole	414
Allen v. Trimble	435	Baker v. St. Quentin	755
Althof v. Wolf	310	Baker v. Townshend	604
Ames v. Howard	205, 206	Baker v. Whitesides	140
Amis v. Kyle	465	Balch v. Symes	759, 760
Anderson v. Belcher	562	Baldwin v. Elphinstone	559
Anderson v. Green	493	Balme v. Wombough	271
Anderson v. State	419	Baltimore & S. R. R. Co. v. Nes-	
Andrews v. Dole	612	bit	375
Andrews v. Estes	49	Bank v. Culver	757
Angle v. Miss. & Mo. R. R. Co..	555	Bank v. Fordyce	484
Angus v. Radin	310	Bank of Chenango v. Hyde	587
Anthony Mildmay, <i>In re</i>	242	Bank of Georgia v. Lewin	271
Appesley v. Ive	511	Bank of Hindustan, <i>In re</i>	755
Appleby v. Dods	519	Bank of Montpelier v. Dillon	297
Aram v. Schallenberger	132, 133, 134	Bank of Montpelier v. Dixon	264
Arayo v. Currell	270	Bank of Newbern v. Taylor	347
Argles v. Heaseman	521	Bank of Rutland v. Buck	587, 588
Argo, The	682	Bank of the State v. Cooper	113
Armstrong v. Jackson	704	Bank of Toronto v. Hunter	264
Armsworthy v. Cheshire	642	Banks v. Sutton	242
Arnold v. Camp	623	Banner v. Low	522
Arnold v. Gorr	480	Barber v. Brace	750
Arnold v. Patrick	254	Barclay v. Howell	174
Arnold v. Potter	271	Bard v. Poole	270
Ash v. Cummins	374	Barker v. Henry	348
Atkinson v. Hutchinson	245	Barker v. May	399
Atkinson v. Jordan	657	Barnard v. Lee	278
Attorney-general v. Corporation		Barnard v. Leigh	491
of Exeter	165	Barnard v. Stevens	166

	PAGE		PAGE
Barnes v. Foley.....	298	Bethum v. Turner	170
Barnes v. Racine.....	132, 134	Bettison v. Budd	437
Barnesley v. Powell.....	756, 759	Betts v. Bagley.....	763
Barnet v. Barnet.....	537	Bevan v. Lewis.....	413
Barnett's appeal.....	513	B. G. Sav. Bank v. Todd	758
Barney v. Patterson.....	690	Bigelow v. Benton.....	297
Baron v. Mayor etc. of Baltimore.	128	Bigelow v. Inhabitants of Ran-	
Barr v. Gratz.....	686	dolph.....	161
Barrall v. Jewell.....	206	Bigelow v. Stearns.....	686
Barrera v. Alpuente.....	270	Bigelow v. Woodward.....	601
Barrett v. French.....	197	Bigley v. Nunan.....	132, 133
Barrett v. Hall.....	206	Bilbie v. Lumley.. ..	387
Barrett v. Pritchard.....	36	Bingham v. Bingham.	388, 394
Bartlet v. Harlow.....	615	Bingham's appeal.....	598
Bartlett v. Viner.....	462	Binks v. Binks.....	274
Barton v. Briscoe.....	500	Bird v. Clark.....	548
Barton v. Hansom.....	381	Bird v. Holbrook.....	308
Barton v. Harrison.....	381	Bissell v. Briggs.....	683
Bass v. Brooks.....	707	Bissell v. Gold.....	428
Batchelder v. Shapleigh.....	156	Black v. Galway.....	541
Bateman v. Bailey.....	60	Blackman v. Simmons.....	309
Bathgate v. Haskin.....	270	Blacknall v. Parish.....	422
Bawtree v. Watson.....	755	Blaine v. The Charles Carter....	689
Baxter v. Winooski T. Co....	132, 135	Blake v. Clarke.....	201
Bay v. Coddington.....	589	Blakes, <i>Ex parte</i>	467
Beal v. Brooks' Ex'rs.....	607	Blanc v. Klumpke.....	132, 134
Beal v. Stehley.....	502	Blanchard v. Ely.....	285
Bean v. Hubbard.....	156	Bland v. O'Hagan.....	422
Bean v. Myers.....	583	Bleven v. Freer.....	64
Bean v. Sturtevant.....	303	Blight's Heirs v. Tobin.....	704
Beatty v. Byers.....	502	Blight's Lessee v. Rochester....	606
Beatty v. Kurtz.....	171	Blood v. Goodrich.....	140, 278
Becker v. Smith	489	Bloomfield N. G. Co. v. Richard-	
Bedford v. Urquhart.....	435	son.....	372
Beebe v. Russell.....	274	Blosse, <i>In re</i>	489
Beekman v. Lansing.....	490	Blount v. Burrow	564
Beekman v. Saratoga etc. R. R.		Bloxam v. Elsee.....	204
Co....	315, 316, 322, 344, 357,	Blystone v. Blystone	484
	373	Bodwell v. Osgood.....	223, 224
Beekman v. Shouse	751	Bodwell v. Swan.....	222
Beeley v. Wingfield.....	603	Bohlman v. Green Bay & L. P.	
Belden v. Carter.....	567	R. W. Co.....	375
Belknap v. Belknap.....	337, 341	Booker v. Booker.....	583
Bell v. Loughbridge.....	483	Bool v. Mix.....	295
Bell v. Morrison.....	414	Boon v. Eyre	710
Bell v. Moss.....	545	Borden v. Fitch.....	686
Bell v. Reed.....	746	Borden v. Sumner.....	657
Bell v. Stone.....	556, 771	Bosley v. Chesapeake Ins. Co....	116
Bellas v. McCarty.....	498	Bostick v. Rutherford	423
Bellinger v. N. Y. Cent. R. R....	372	Boston Bank v. Chamberlain	291
Belt v. Wilson's Adm'r.....	744	Botley, <i>In re</i>	182
Benedict v. Gaylord.....	226	Boulton v. Bull.....	204
Benjamin v. Benjamin.....	756	Bourland v. Hildreth.....	113
Benjamin v. Storr.....	135	Bourn v. Mason.....	458
Bennet v. Davis.....	244, 247, 571	Bouslough v. Bouslough	484
Bennet v. Holt.....	36, 626	Bowen v. Bradley.....	271
Bennock v. Whipple.....	626	Bowen v. Buck.....	601, 604
Bensley v. Mount. Lake Co....	372, 375	Bowers v. Fitzrandolph.....	309
Benson v. Benson.....	500	Bowers v. Hurd.....	43
Bentley v. Dillard.....	737	Bowers v. Suffolk Mfg. Co.....	150
Bentley v. Griffin.....	528	Bowker v. Walker.....	606
Berger v. Duff.....	182, 692	Bowling Green Sav. Bank v. Todd	759
Berret v. Oliver.....	98	Boyce v. City of St. Louis	271
Berrill v. Smith.....	465	Boydell v. Drummond.....	144
Bethel v. Stanhope.....	562		

CASES CITED.

13

	PAGE		PAGE
Boykin v. Ciples.....	572	Burrill v. Phillips	48
Boynston v. Curle.....	191	Burrows v. McWhanna.....	283
Bradbury v. Wright.....	514	Burrows v. Pixley	182
Bradford, <i>Inf.</i>	161	Burrows v. Wham.....	283
Bradford v. Hill	154	Bursley v. Hamilton	64
Bradley v. Heath.....220, 221,	223	Burtis v. Buffalo S. L. R. R. Co.	303
Bradley v. Hunt.....	309	Bush v. Baker.....	189
Bradshaw v. Newman.....	270	Bush v. Cole	295
Brady v. Bronson.....	374	Bush v. Williams.....	685
Bragner v. Langmead.....	345	Butler v. Baker	647
Brand v. Daunoy.....	227	Butler v. Buckingham	513
Brashear v. West..... 646, 650,	654	Butler v. Buller	519
Breckenridge's Heirs v. Ormaby {	295	Butler v. Duncomb	539
	513	Butler v. Lee.....	274
Bree v. Holbach.....	309	Butler v. Palmer.....105,	168
Brice v. Stokes.....	581	Butler v. Ravine Road Sewer Co.	375
Bridge v. Eggleston.....	61	Butt v. Conant	300
Briggs v. Penniman.....	107	Button v. Cole	480
Brigham v. Brigham.....	386		
Brisbane v. Dacres.....	387	Cadogan v. Kennett.....	471
Bristow v. Warde.....	505	Cahen v. Jarrett.....	112
Broad v. Jollyffe.....	129	Cain v. Southern Express Co....	601
Brock v. Copeland.....	397	Caldwell v. Walters.....	513
Brock v. Hishen	374	Callen v. Thompson.....	450
Broh v. Jenkins.....	279	Callender v. Marsh	343
Bromage v. Prosser.....	223	Camden R. R. Co. v. Burke	303
Brooke v. Garrod	278	Cameron v. Lightfoot	666
Brooks v. Bicknell.....	206	Cammeyer v. U. G. L. Church ..	277
Brooks v. Jenkins.....	205	Campau v. Godfrey	617
Brooks v. Marbury.....	650	Campbell v. Arnold.....	65
Brooks v. Powers.....	450	Campbell v. Gilbert.....	448
Brown v. Brown.....	274	Campbell v. Hall	467
Brown v. Caldwell.....	116	Campbell v. Jones	710
Brown v. Croom.....223,	772	Campbell v. Lacock.....	460
Brown v. Gibson.....	688	Campbell v. Vining.....	612
Brown v. Higginbotham.....	882	Campbell v. Watson	435
Brown v. Manning.....150,	188	Campbell v. Worthington	625
Brown v. McKinnally.....	618	Campion v. Benyon.....	204
Brown v. Minturn.....	650	Canaan, Town of, v. Greenwood	
Brown v. Ramsay.....	232	Turnpike Co.	688
Brown v. Town of Canton	295	Cannon v. Hatcher	65
Brown v. Watson.....132, 134,	135	Carden v. Tuck	236
Bruch v. Lantz.....	72	Carlton v. Bokee	206
Bryan v. Beckley.....	154	Carlton v. King	216
Bryan v. Hinman.....	692	Carpenter v. Cresswell	711
Bryant, <i>Ex parte</i>	758	Carpenter v. Mather.....	629
Buchan v. Sumner.....	411	Carr v. Price.....	205
Buchanan v. Tracey.....	437	Carroll v. Lee.....	502
Buck v. Aiken.....	548	Carroll v. Staten Island R. R. Co.	310
Buckley v. Leonard.....	310	Carroll v. Weiler	312
Budgden v. Ampthill.....	231	Carson v. Coleman	375
Buehler v. Glominger.....	483	Carson v. Noblet	540
Buffington v. Curtis.....	39	Carter v. Burr.....	285
Bullitt v. Meth. Church.....	545	Carter v. Davis.....	756
Bullock v. Dommit.....	138	Carter v. Harris.....	703
Bumpass v. Webb.....	673	Cartwright v. Amatt.....	226
Bunford v. Purcell.....	614	Cassady v. Clarke	140
Burd v. McGregor	477	Cassell v. Cooke	40, 194
Burdett's case	560	Cathcart v. Hurdy.....	325
Burlingame v. Burlingame.....	221	Catakill Bank v. Gray.....	382
Burlington v. Calais	61	Chamberlain v. Agar	639
Burnell v. Robertson.....	58	Chandler v. Belden	199
Burr v. Mueller	411	Chandler v. Johnson.....	601
Burr v. Stum	499	Chapin v. Pease	216

	PAGE		PAGE
Chapin v. Shafer	295	Colegrove v. Harlem & N. H. R.	
Chaplin v. Rogers	57	R. Co.	312
Chapman v. Dyett	667	Coleman v. Coleman	737
Chapman v. Gates	372	Coleman v. Henderson	465
Chapman v. Turner	36	Colgate v. Colgate	237
Chappell v. Brown	562	Collard v. Swan	445
Chardon v. Oliphant	416	Collins v. Allen	49, 720
Charles River Br. Co. v. Warren		Collins v. Blantern	601
Br. Co.	324, 345	Collins v. Jones	737
Chase, <i>In re</i>	36, 626	Colt v. McMechen.	554, 746, 752
Chase v. Ralston	450	Colwell v. Woods	626
Chaworth, Lady, <i>In re</i>	510	Combe v. Brazier	692
Cheltenham Fire Brick Co. v.		Commercial Bank v. Wood	460
Cook	601	Commonwealth v. Baldwin.	274
Cherry v. Mann	180	Commonwealth v. Blanding {	218, 220
Chesapeake & Ohio Canal Co. v.		Commonwealth v. Bowden.	596
Balt. & Ohio R. R. Co.	682	Commonwealth v. Clap. . . {	218, 220
Chesman v. Nainby	122	Commonwealth v. Cook.	595
Chestnut Hill T. Co. v. Rutter..	161	Commonwealth v. Fisher.	373
Chew v. Barnet	452	Commonwealth v. Fisk	150
Chichester v. Lethbridge	126	Commonwealth v. Jeandell	465
Chipman v. Palmer	312	Commonwealth v. McCall	574
Cholmondeley v. Clinton	226, 273	Commonwealth v. Molitz.	477
Christian v. Miller	737	Commonwealth v. Morris	780
Christ's Hospital v. Bridewell...	83	Commonwealth v. Pease	603
Church v. Gilman	657	Commonwealth v. Power.	213
Churchill, Lord, v. Hunt	772	Commonwealth v. Randall	419
Cincinnati v. White. 148, 170, 171,	174	Commonwealth v. Richards.	52
City of Chicago v. Barbian	375	Commonwealth v. Seed	419
Clap v. McNeil	177	Commonwealth v. St. Patrick	
Clapp v. Bromoghan	405	Benevolent Soc.	104
Clapp v. Brougham	405	Commonwealth v. Strembeck	490
Clark v. Binney	220	Commonwealth v. Whitmarsh ...	218
Clark v. Dutcher	387, 388	Comyn v. Boyer	462
Clark v. Gilbert	719	Congregational Soc. v. Perry	52
Clark v. Martin	452	Conroe v. Birdsall	290, 293
Clark v. Masters	303	Constantine v. Van Winkle	295
Clark v. Peckham	132, 134	Conway's Ex'rs v. Alexander	625
Clark v. Pomeroy	601	Cook v. Grant	483
Clark v. Ricker	601	Cook v. Johnson	157
Clark v. Russell	621	Cooly v. Patterson	756
Clark v. Washington	161	Coombe v. Wolfe	296
Clarke v. City of Rochester	372	Coombs v. Jordan	256
Clarke v. Comer	122	Cooper v. Chambers	614
Clarke v. Davies	533	Cooper v. McJunkin	419
Clemm v. Davidson	533	Cooper v. Mowry	162
Clerke v. Comer	122	Cooper v. Telfair	347, 348
Clorell v. Tradesman's Bank	589	Cooper v. Williams	316, 373
Clow v. Woods	450	Cope v. Alden	271
Clowes v. Dickenson	262	Cope v. Smith	297
Clowes v. Dickinson	262	Coppock v. Bower	601, 602
Clubb v. Hutson	601	Corbet's case	241
Coast Line R. R. Co. v. Cohen..	132	Corbin v. Kendrick	619
Coate v. Speer	636	Corley v. Williams	601, 604
Cobb v. Haskell	39, 59	Cornell v. Jackson	154
Cobden v. Kendrick	619	Cornell v. Lovett's Ex'r	457
Coburn v. Ames	132	Corse v. Leggett	256
Cockayne v. Hodgkinson. 220, 221,	223	Cotter v. Bettner	382
Cockshott v. Bennett	654	Cotton v. James	424
Coithe v. Crane	274	Cottrill v. Myrick	361
Colby v. Reynolds	561	Coughlin v. N. Y. C. R. R. Co..	758
Colcord v. Swan and Wife	445		
Cole v. Goodwin	303		
Cole v. Shurtleff	614		

CASES CITED.

15

	PAGE		PAGE
Coutts v. Walker.....	644	Dean v. Newhall.....	675
Cowden v. Pleasants.....	545	Deane v. Clayton.....	307, 308
Cowell v. Edwards.....	694, 695	Deansville Cemetery Ass., <i>In re</i>	373
Cowell v. Simpson.....	199, 760	Dearth v. Williamson.....	194
Cowen v. Boone.....	760	Deblois v. Ocean Ins. Co.....	552
Cox v. Nelson.....	704	De Bolle v. Pa. Ins. Co.....	460
Cox v. Peterson.....	555	De Forest v. Bacon.....	650
Cozens v. Whitney.....	757	De Haven v. Bartholomew.....	477
Crafts v. Hibbard.....	154	Delacroix v. Thevanot.....	560
Craig v. Childress.....	554, 751	Delany v. Jones.....	223, 772
Craig v. Cox.....	297	Dell v. Babthorpe.....	174
Crane v. Conklin.....	442	Del. & Md. R. R. Co. v. Stamp.....	715
Crane v. Meginnis.....	98	Demming v. Smith.....	692
Crary v. Sprague.....	52	De Moranda v. Dunkin.....	163
Crawford v. Taylor.....	45, 657	De Mott v. Laraway.....	303
Creagher v. Brengle.....	264	Den v. Hardenberg.....	62
Crenshaw v. Same.....	667	Denham v. Cornell.....	256
Cripple v. Heermance.....	277	Denton v. Noyes.....	739, 740
Critchley, <i>Ex parte</i>	601	Depau v. Humphreys.....	269
Crocker v. Mann.....	64, 116, 166	Depeau v. Humphreys.....	269
Cropp v. Tilney.....	773	Derby T. Co. v. Parks.....	113
Crosby v. Harrison.....	122	Descadillas v. Harris.....	48
Crosby v. Shelton.....	562	Deshazzo v. Lewis.....	140
Cross v. Richardson.....	614	Dewar v. Span.....	267
Crow v. Rogers.....	459	Deyo v. Jennison.....	156
Crutterell v. Lye.....	122	Dicas v. Stockley.....	759
Cuddon v. Eastwick.....	122	Dickey v. Adm'rs of Putnam.....	535
Cullum v. Bevans.....	533	Dimon v. Delmonico.....	382
Cumber v. Wane.....	675	District Township v. Smith.....	140
Cumberland, Duke of, v. Codring- ton.....	43	Dixon v. Moyer.....	205
Cummings v. Harris.....	200	Dob v. Halsey.....	382
Cummings v. Mills.....	382	Dodd v. Brott.....	757
Currier v. R. R.....	757	Dodge v. Ayerigg.....	432
Curt v. Leavitt.....	271	Dodson v. Ball.....	502, 513
Curtis v. Leavitt.....	271	Doe v. Alsop.....	282
Cushman v. Bailey.....	382	Doe v. Collins.....	201, 236
Cushman v. Smith.....	375	Doe v. Howland.....	62
Cutler v. Tufts.....	226	Doe ex dem. Garnous v. Knight.....	648
Cutter v. Davenport.....	467	Doe v. Morgan.....	507
Cutter v. Powell.....	519, 520	Doe v. Paine.....	154
Cuyler v. Ensworth.....	263	Doe v. Thorn.....	479
		Doebler v. Snavely.....	473
Daggett v. Shaw.....	303, 554	Dohner's Assignees, <i>In re</i>	545
Daley v. Bartholomew.....	480	Dominick v. Michael.....	295
Daimouth v. Bennett.....	601	Donner v. Palmer.....	208
Dale v. Smith.....	154	Dorr v. Fenno.....	120
D'Anas v. Keyser.....	278	Dorrance v. Scott.....	513, 535
Darby v. Russel.....	704	Dorrance's Adm'r v. Common- wealth.....	489
Darley v. Darley.....	244	Dorsey v. Dorsey.....	197
Dartmouth College v. Wood- ward.....	90, 92, 348, 363	Dorsey Harvester and Revolv. Rake Co. v. Marsh.....	206
Dater v. Troy T. & R. R. Co.....	373	Douglas v. Huston.....	253
Davey v. Prendergrass.....	674, 675	Douglass v. Scott.....	433
David v. Bridgman.....	582	Douglass v. Wickwire.....	765
Davies v. Lowndes.....	756	Dow v. Smith.....	156
Davis v. Gardiner.....	768	Downton v. Yaeger Milling Co..	206
Davis v. Garrett.....	748	Doyle v. Dixon.....	145
Davis v. Mayor of New York ...	372	Drage v. Ibberson.....	603
Davis v. Steiner.....	535	Drake v. Hudson R. R. R. Co...	372
Davison v. Gill.....	666	Drayton v. Wells.....	52
Davoll v. Brown.....	205, 206	Drinkwater v. Goodwin.....	48
Dawson v. St. Paul F. & M. Ins. Co.....	132, 135	Dronberger v. Reed.....	374
		Drury v. Defontaine.....	462

	PAGE		PAGE
Drury v. Smith.....	504	Ewing v. Smith.....	571
Drury, Dr., <i>in re</i>	511	Fabbri v. Mercantile M. I. Co....	302
Dubois' appeal.....	757	Fairman v. Ives.....	221, 223
Dudley v. Kennedy.....	132, 134	Farley v. Thompson.....	157
Dufour v. Camfrans.....	437, 439	Farmers and Mech. Bk. of George-	
Duggert v. Schenck.....	135	town v. Planters' Bk.....	115
Duke v. Harper.....	607	Farnam v. Brooks.....	475
Dulaney v. Hoffman.....	45	Farrant v. Thompson.....	490
Duncan v. Hodges.....	422	Farwell v. Davis.....	255
Duncan v. Lyon.....	735, 737	Fay v. Oatley.....	604
Duncan v. Potts.....	65	Fennster v. Markham.....	699
Dunlap v. Snyder.....	340	Fellows v. Prentiss.....	297
Dunn v. Stone.....	432	Felton v. Greaves.....	304
Dusenbury v. Ellis.....	719	Fernald v. Lewis.....	165
Duval v. Farmers' Bank.....	261	Ferras, <i>in re</i>	592
Dwight v. Brewster.....	751	Fettiplace v. George.....	570
Dyer v. Tuscaloosa Bridge Co....	317	Field v. Gibbs.....	479
Dyer v. Wightman.....	517	Field v. Schieffelin.....	250, 251
Dyott's estate.....	484	Finch's Ex'rs v. Alston.....	65
Eager v. Atlas Ins. Co.....	752	Fineux v. Hovenden.....	181
East India Co. v. Vincent.....	174	Finley's appeal.....	513
Eastwoodhey v. Westwoodhey..	231	Finney v. Finney.....	460
Edgecombe v. Redd.....	601	First Baptist Church v. U. & S.	
Eddie v. East India Co.....	300	R. R. Co.....	372
Edrington v. Harper.....	626	Firth v. Barker.....	299
Edwards v. Harben.....	562	Fisher v. Bartlett.....	64
Edwards v. McLeay.....	387	Fisher v. Otis.....	271
Elevated R. R., <i>in re</i>	372	Fisk v. Newton.....	363
Elliott v. Peirsol.....	609	Fissler's appeal.....	278
Elliott v. Rossell.....	554	Fitch v. Remer.....	271
Elliott v. Russell.....	746	Fitchburg Manuf. Corp. v. Mel-	
Ellis v. Short.....	40, 52	ven.....	157
Ellison v. Airey.....	505	Fitzgerald v. Peck.....	387, 394
Ellison v. Ellison.....	650	Fitzgerald v. Peck.....	387
Ellmaker v. Buckley.....	534	Fitzhugh v. Croghan.....	283
Ellsworth v. Cook.....	261	Fivaz v. Nicholls.....	601
Elmore v. Stone.....	57	Flanner v. Moore.....	411
Elwood v. Diefendorf.....	264	Fleetwood v. Jansen.....	656
Embury v. Conner.....	372	Fletcher v. Auburn & S. R. R. Co.	372
Emden v. Darley.....	754	Fletcher v. Howard.....	40
Emerson v. Hogg.....	205	Fletcher v. Peck.....	347
Emery v. Hersey.....	48	Flynn v. McKeon.....	277
Emily v. Lye.....	413	Foot v. Stevens.....	763
Empire Transportation Co. v.		Foot v. Tewksbury.....	758
Wamsutta Oil Co.....	556	Forster v. Fuller.....	719
Enfield v. Permit.....	208	Forster v. Hale.....	493
England v. Slade.....	437	Forward v. Pittard.....	555
Erwin v. Vint.....	642	Foster's case.....	682
Esling v. Zantzinger.....	460	Foster v. Dennison.....	435
Esmond v. Tarbox.....	154	Foster v. Fielder.....	719
Estwick v. Cailland.....	646	Foster v. Fletcher.....	548
Evans v. Commonwealth.....	541	Foster v. Jack.....	475
Evans v. Eaton.....	205	Fothergill v. Walton.....	711
Evans v. Hettick.....	206	Foulke v. Harding.....	545
Evans v. Hughes.....	501	Fowler v. Bott.....	138, 139
Evans v. Llewellyn.....	387	Fowler v. Shearer.....	430, 431
Evans' appeal.....	502	Fowler v. Spencer.....	445
Everett v. Coffin.....	49	Fox v. Mench.....	465
Evertson v. Sutton.....	65	Fox v. Scott.....	502
Ewart v. Street.....	554	Foxon v. Gascoigne.....	759
Ewell v. Greenwood.....	132, 134, 135	Francis v. Mellor.....	205
Ewing v. Gordon.....	278	Francis v. Schoellkopf.....	132, 133
Ewing v. Handley.....	484	Frary v. Dakin.....	763

CASES CITED.

17

	PAGE		PAGE
Freehold Co., <i>In re</i>	755	Goelet v. McManna.....	283
Freeman v. Clute.....	285	Goforth, Lessee of, v. Longworth	689
Freeman v. Paul.....	166	Gogel v. Jacoby.....	737
Freeman v. Ruston.....	700	Golden v. Manning.....	298, 302
Freemantle & Co. v. Silk Throw-		Goldsmid v. Lewis County Bank..	372
sters.....	122	Gooch v. Massey.....	589
French v. Peters.....	432	Goodburn v. Marley.....	191
Frissell v. Hails.....	757	Goodill v. Brigham.....	242
Friswell v. King.....	755	Goodloe v. Cincinnati.....	161
Frost v. Spaulding.....	154	Goodman v. Chase.....	613
Frowman v. Smith.....	426	Goodrick v. Odenheimer.....	469
Fullam v. Adams.....	614	Goodyear v. The Railroad...205,	206
Fuller v. Hubbard.....	278	Goodyear v. Watson.....	264
Fuller v. Williams.....	278	Gordon v. Baxter.....	132, 134
Fulton v. Davidson.....	581	Gordon v. Harper.....	547
Fulton's estate, <i>In re</i>	545	Gordon v. Little.....	752
		Gordon v. Stevens.....	665
Gabay v. Lloyd.....	750	Gorham v. Canton.....	60
Gager v. Watson.....	753, 754	Gould v. Glass.....	372
Gallagher v. Milligan.....	534	Gould v. Hudson R. R. Co....	372
Galley v. Davenport.....	480	Goupy v. Hardy.....	47
Gainsha v. Sinclear.....	615	Governor etc. of the Cast Plate	
Gangwer v. Fry.....	493	Man. Co. v. Meredith.....	331, 347
Gardiner Mfg. Co. v. Heald.....	704	Graff v. Smith.....	692
Gardner v. Maxey.....	601	Graham v. Commercial Ins. Co..	749
Gardner v. The Village of New-		Graham v. Holt.....	422
burgh.....	337, 338	Graham v. Long.....	513
Garland v. Rives.....	656	Graham v. Peat.....	65
Garrard v. Lord Landerdale.....	651, 652	Grainger v. State.....	53, 56
Garside v. Proprietors.....	298	Grandin v. Le Roy.....	596
Garvey v. Jarvis.....	256	Graves v. Boyle.....	505
Gashweiler's Heirs v. McIlvoy ..	335	Graves and Barnewall v. Boston	
Gaskill v. Dudley.....	166	Mar. Ins. Co.....	733
Gates v. Lewis.....	226	Gray v. Hill.....	650
Genet v. Tallmadge.....	250	Gray v. James.....	266
George v. Elliott.....	519	Greasly v. Codling.....	127
Gervis and Wife v. Brown.....	688	Green v. Green.....	663
Getchell v. Clark.....	758	Green v. Lake.....	132
Gibbins v. Trumbull.....	247	Green v. Liter.....	268
Gibbs v. Angier.....	399	Green v. Price.....	702
Gibbs v. Chase.....	489	Green v. Sarmiento.....	686
Gibbs v. Neely.....	535	Greene v. Mindemacher.....	132, 133
Gibbs v. Ongier.....	399	Greenleaf v. Quincy.....	416
Gibson v. Culver.....	750	Griffis v. Sellars.....	426
Gibson v. Warren.....	256	Griffith v. Frazier.....	180
Gichell v. Logan.....	442	Griffith v. Hood.....	570
Gifford v. Thompson.....	522	Griffith v. Ogle.....	469
Giles v. O'Toole.....	285	Griffith v. Parks.....	72
Gillespie v. Moon.....	393	Grigsby v. Burnett.....	374
Gillett v. Stanley.....	295	Grigsby v. Clear Lake Water Co.	134
Gillis v. Martin.....	626	Grimstone v. Carter.....	283
Gilman v. Lowell.....	221, 780	Grisson v. Fite.....	589
Gilmore v. Carmen.....	555, 556	Griswold v. Johnson.....	615
Gilmore v. Whitesides.....	585	Greenvelt v. Burwell.....	425
Girard Life Ins. Co. v. Chambers.	502	Grove v. Todd.....	112
Gist v. Hamly.....	755	Gundt's appeal.....	513
Glasse v. Hayman.....	488	Gunmakers of London v. Fell...	122
Glassell v. Thomas.....	393	Guthrie v. Murphy.....	295
Glazebrook v. Woodrow.....	709		
Glen v. Fisher.....	261	Hackley v. Patrick.....	414
Glenorchy, Lord, v. Bosville....	246	Hackman v. Flory.....	535
Glidden v. Strupler.....	513	Hadoes v. Levit.....	458
Glyde v. Keister.....	513	Hale v. Henrie.....	464
Godin v. London Ass. Co.....	48	Hale v. N. J. Nav. Co.....	751

	PAGE		PAGE
Hale v. Webb.....	521	Haynes v. Fuller.....	140
Hale v. Williams.....	686	Head v. Gervais.....	704
Hall's case.....	237	Hearle v. Greenbank.....	245, 246
Hall v. Holden.....	161	Heartt v. Chipman.....	757
Hall v. Howd.....	667, 763	Heathcote v. Crookshanks ..	654, 675
Hall v. Penney.....	156	Heathe v. Heathe.....	505
Hall v. Williams.....	481, 686	Hefflin v. McMann.....	166
Hallet v. Wylie.....	140	Heimstreit v. Howland.....	382
Hambright v. Brockman ..	197	Heister v. Fortner.....	544, 545
Hamersley v. Mayor etc. of N. Y.	374	Hellman v. Hellman.....	448
Hamilton v. Bishop.....	502	Helm v. Wilson.....	712
Hamilton v. Buckwalter.....	665	Helms v. Franciscus.....	261
Hamilton v. Columbus.....	133	Henchey v. City of Chicago.....	758
Hamilton v. Dalziel.....	163	Henderson v. McDuffee.....	518
Hammatt v. Davenport.....	700	Henderson v. Palmer.....	601
Hammonds v. Barclay.....	48	Henderson v. Robertson.....	185
Hamper, <i>Ex parte</i>	380	Hendricks v. Johnson.....	714
Hampton v. McConnell.....	686	Hendricks v. Robinson.....	646
Hannah v. Swarner.....	502	Henry v. Davis.....	625
Harbison v. Lemon.....	626	Henshaw v. Rowland.....	302
Harden v. Boyce.....	312	Hess v. Heeble.....	686
Harding v. Craigie.....	621	Hewitt v. State.....	673
Harding v. Glynn.....	505	Hiern v. Mill.....	670
Harding v. Goodlett.....	316, 317, 373	Hildreth v. Shepard.....	271
Harmon v. Bird.....	205	Hill v. Brinkley.....	757
Harner v. Fisher.....	535	Hill v. Dyer.....	208
Harper v. Charlesworth.....	170	Hill v. Grant.....	236
Harrington v. McShane.....	555, 751	Hill v. Graunge.....	236
Harris' estate.....	502	Hill v. Miles.....	220, 222
Harris v. Gillingham.....	213	Hill v. Thompson.....	204
Harrison v. Gardner.....	122	Hinckley v. Emerson.....	309, 310
Harrison v. Godman.....	122	Hinckley v. Hastings ..	146, 148, 149
Harrison v. Harrison.....	112	Hind v. Holdship.....	621
Harrison v. Lane.....	518	Hinds v. Chamberlain.....	601
Harrison v. Sterett.....	132	Hines v. State.....	576
Harrod v. Barretto.....	763	Hinman v. Leavenworth.....	615
Hart v. Bassett.....	126	Hinman v. Woodruff.....	601, 603
Hart v. Burnett.....	188	Hinson v. Hinson.....	591
Hart v. Cleis.....	325, 333	Hirst v. Tolson.....	521
Hartley v. Decker.....	519	Hitchcock v. Giddings.....	393
Hartman v. Ogborn.....	513	Hitchings v. Lewis.....	180
Hartwell v. Armstrong.....	372	Hobbs v. Lowell.....	150, 161
Harvey v. Harvey.....	245	Hobson v. Watson.....	758
Hasey v. Christie.....	47	Hodgden v. Scarlett.....	223
Haskell v. New Bedford.....	161	Hodges v. Isaacs.....	505
Haslam v. Adams Express Co...	303	Hodgman v. Smith.....	382
Hatch v. Hatch.....	650	Hodgson v. Dexter.....	719
Hatch v. Smith.....	132	Hodgson v. Scarlett.....	223
Hatch v. Vt. C. R. R. Co.....	132	Hogg v. Emerson.....	204, 205
Hatermehl v. Dickerson ...	373, 374	Hoit v. Cooper.....	603
Haughton v. Harrison.....	505	Hoke v. Henderson.....	113
Haughy v. Strang.....	642, 737	Holbrook v. Murray.....	481
Haven v. Foster.....	387	Holcomb v. Stimpson.....	603
Haviland v. Myers and Bloom...	258	Holden v. Gilbert.....	270
Hawes v. Leader.....	562	Holdridge v. Webb.....	396
Hawkins v. Blewitt.....	568	Hollingsworth v. McDonnell....	541
Hawkins v. Bluett.....	568	Hollins v. Patterson.....	666
Hawks v. Charlemont.....	161	Hollis v. Claridge.....	755
Hay v. Palmer.....	522	Holmes v. Holmes.....	261
Hayden v. Inhabitants of Attle-		Holt v. Scholefield.....	768
borough.....	149	Holyoke v. Haskins.....	180
Hayden v. Little.....	191	Homer v. Ashford.....	121
Hayden v. Stone.....	150	Homer v. Fish.....	481, 686
Hayes v. Ward.....	264	Hooker v. Pierce.....	283

	PAGE		PAGE
Hooper v. Welch.....	759	Inhab. of Worcester v. Eaton.....	292, 294
Hopewell v. Amwell.....	756	Inman v. Foster.....	223
Hopkins v. Beebe.....	472	Inwood v. Twyne.....	249
Hopkins v. Grey.....	646	Irving v. De Kay.....	270
Hopkins v. Hopkins.....	212	Irving v. Viand.....	756
Hopkins v. Lee.....	686	Irwin v. Workman.....	757
Hopkins' Ex'rs v. Maryck.....	393	Isaac v. Isaac.....	505
Hopkins' Ex'rs v. Maryck.....	393, 395	Iveson v. Moore.....	126
Hornblower v. Boulton.....	204		
Horsely v. Chaloner.....	505	Jackson v. Betts.....	749
Horton v. Child.....	413	Jackson v. Bowen.....	700
Hosford v. Nichols.....	467	Jackson v. Burchin.....	290, 292
Hostler v. Skull.....	548	Jackson v. Burgott.....	281, 282
Hostler's, The, case.....	199	Jackson v. Caldwell.....	690, 699
Houck v. Wachter.....	132, 135	Jackson v. Carpenter.....	290, 292
Houghton v. Matthews.....	48	Jackson v. Churchill.....	237
Houston v. Stanton.....	411	Jackson v. Davis.....	437
Hovey v. Stevens.....	205, 206	Jackson v. Gilchrist.....	289
How v. Rogers.....	459	Jackson v. Johnson.....	248, 607
Howard v. Moffatt.....	259	Jackson v. Leek.....	283
Howe, In re.....	256	Jackson v. Lomas.....	654
Howe v. Bass.....	154	Jackson v. Loomis.....	457
Howe v. Palmer.....	57	Jackson v. Luquere.....	286, 287
Howry v. Miller.....	543	Jackson v. Marshall.....	484
Howse v. Nute.....	206	Jackson v. Matadorf.....	451
Hoyt v. Hudson.....	451	Jackson v. McCall.....	636
Hubbard v. Cummings.....	291	Jackson v. McChesney.....	283
Hubbert v. Borden.....	460	Jackson v. Morse.....	700
Hubert v. Groves.....	126, 129	Jackson v. Post.....	282
Hudnal v. Wilder.....	216	Jackson v. Pratt.....	437
Hudson v. Hudson.....	692	Jackson v. Robins.....	500, 502
Hudson v. Reovett.....	421	Jackson v. Stetson.....	222
Hudson v. Revett.....	421	Jackson v. Todd.....	290
Hughes v. Blake.....	686	Jackson v. Vanderheyden.....	445
Hughes v. Heiser.....	132	Jackson v. Willard.....	444
Hughes v. Trustees of Modern College.....	341	Jackson v. Winn's Heirs.....	335, 343
Hughlett v. Hughlett.....	581	Jackson v. Woolsey.....	437
Hughs v. Edwards.....	625	Jacobs v. Hall.....	686
Huguenin v. Baseley.....	639	Jacobs v. Morange.....	396
Hullett v. Hague.....	204	James v. Fowks.....	510
Hulme v. Tenant.....	570	Jaques v. Marquand.....	414
Humphrey v. Browning.....	755, 757	Jarvis v. Dean.....	147
Humphry v. Beeson.....	437	Jarvis v. Santa Clara V. R. R. Co.....	132
Hunn v. Bowne.....	57	Jeans v. Wilkins.....	479, 701
Hunt v. Algar.....	220	Jenkins v. Clement.....	484
Hunt v. Barfield.....	140	Jenkins v. Eichelberger.....	670
Hunt v. Chamberlain's Ex'rs.....	692	Jenkins v. Stephens.....	758
Hunt v. Rousmaniere.....	385, 386, 388, 394	Jenkins v. Walker.....	205
Huston v. Mitchell.....	704	Jerome v. Ross.....	319, 328, 336 (237, 368, 375)
Hutchins v. Olcott.....	199, 200	Jevens v. Harridge.....	120
Hutchinson v. Howard.....	756, 759	Jew v. Thirkwell.....	515, 516
Hutton v. Bragg.....	199	Jewett v. Lincoln.....	59
Hyde v. Louisiana St. Ina. Co.....	552	Jewett v. Warren.....	39, 58
Hyde v. Proprietors etc.....	298, 300	Jewett's Lessee v. Stratton.....	616
Hyde v. Trent Nav. Co.....	555	Jocelyn v. Donnel.....	673
Hyslop v. Clarke.....	655	Joes v. Axer.....	325
		John v. Farmers and Mech. Bank.....	113
Hott v. Wilkes.....	307	Johnson v. Johnson.....	561, 670
Ingersoll v. Sargeant.....	514	Johnston v. Commonwealth.....	465
Ingersoll v. Van Bokkelin.....	47	Johnston v. Harvey.....	216
Ingraham v. Baldwin.....	295	Jones v. Axen.....	325
Inhab. of Brewer v. Inhab. of New Gloucester.....	164	Jones v. Cliffe.....	759
		Jones v. Jones.....	568

	PAGE		PAGE
Jones v. Noble	278	Kohn v. Packard	303
Jones v. Perry	309	Kosson v. Smith	509
Jones v. Pilcher	554	Krause v. Beitel	502
Jones v. Pitcher	751	Kruger v. Wilcox	43
Jones v. Rice	661	Kuhn v. Newman	502
Jones v. Robbins	278	Kyle, <i>Ex parte</i>	757
Jones v. Sevier	191		
Jourdan v. Jourdan	537	Ladbroke v. James	100
Judson v. Moore	205	Lade v. Shepherd	147, 170
		Laine v. Wells	221
Kasson v. Smith	509	Lake v. King	222, 223, 553, 559
Kay v. Scates	502	Lakeman v. Grinnell	555
Kean v. McKinsey	481	Lamb v. Durant	40
Kearney v. Smith	842	Lambert v. Atkins	510
Keating v. Price	140	Lambert v. Sandford	704
Keble v. Thompson	580	Lamerson v. Marvin	283
Keightley v. Borch	491	Lancaster v. Dolan	513
Keir v. Leeman	601, 804	Landon v. Humphrey	52, 751
Keller v. Rhoads	400	Lane v. Penniman	47
Kelleran v. Brown	625	Lane v. Vick	183
Kellogg v. Gilbert	704	Lanfear v. Sumner	39, 40
Kellogg v. Smith	154	Langdon v. De Groot	205
Kelly v. Partington	223	Langford v. Com'rs of Ramsey	
Kelly v. Tilton	310	County	375
Kelsey v. Murphy	472	Lann v. Church	759
Kemp v. Clough	48	Lansdown v. Lansdown	385, 394
Kemp v. Coughtry	48, 746	Lansing v. Smith	132, 185
Kemp v. Squire	642	Lansing v. Turner	58
Kempe v. Kennedy	691, 763	Latten v. Davis	285
Kemper v. Kemper	656	Lauder v. Seaver	419
Kerr, <i>In re</i>	372	Lauman's appeal	481
Kerr v. Purdy	278	Lawrence v. Beaubien ...	387, 393
Kettleby v. Lamb	687		394, 395
Kidney v. Cosmaker	398		396
Kidney v. Coussmaker	398	Lawrence v. Stonington Bank ...	750
Kilburn v. Demming	156	Lawrence v. Wardwell	285
Kilgore v. Dempsey	271	Lawson v. Dickenson	759
Kimball v. Blaisdell	62	Lawson v. Lovejoy	295
Kimbrough v. Lane	601	Lazarus v. Long	416
King v. Baldwin	264	Leach v. Williams	704
King v. Galloway	411	Leadbitter v. Farrow	47
King v. Goodwin	700	Leader v. Danvers	491
King v. Harman's Heirs	270, 626	Learned v. Bryant	64
King v. Rea	446	Leavitt v. Metcalf	156
King v. Root	220, 221, 224	Leavitt v. Truair	165
King v. Sarria	272	Lebanon v. Olcott	375
King, The, v. Creevey	220	Leckie ad. Conty	557
King, The, v. Passmore	90	Le Clercq v. Trustees of Gallipolis	188
King, The, v. Wright	221	Leech v. Leech	544
Kingston v. Preston	709	Lees v. Nuttall	255
Kinlocks, <i>In re</i>	593, 595	Le Fevre v. Lloyd	47
Kip v. Norton	636	Legge v. Thorpe	724
Kirk v. Strickwood	603	Leggett v. Hyde	882
Kirke v. Kirke	500	Lehigh Bridge Co. v. Lehigh C. &	
Kirkman v. Bank of America ...	589	N. Co.	113
Kirwan v. Goodwin	601, 602	Lennard v. Boynton	519
Kitely v. Lamb	687	Leonard v. Leonard	393
Kittle v. Pfeiffer	188	Leonard v. Sussex	244
Kline v. Beebe	291	Leonard v. Vredenburg	613
Knapp v. Burnham	270	Lewis v. Carsaw	490
Knapp v. Parker	620	Lewis v. Few	223
Knight v. Knight	500	Lewis v. Hancock	47
Knox v. Flack	513	Lewis v. Smith	479
Knuckolls v. Lea	583	Lewis v. Swift	59

	PAGE		PAGE
Lewis v. Walter	222, 223	Marbury v. Brooks.....	639, 650
Lewis street, <i>In re</i>	173, 383	Marlborough v. Godolphin..	506, 507
Life v. Mitchell.....	691	Marriott v. Hampton.....	618
Lipe v. Mitchell.....	691	Marsh v. Pier.....	533
Lippincott v. Kelly.....	204	Marsh v. Pike.....	264
Little v. Blunt.....	475	Marshalsea, <i>In re</i>	479, 665
Livermore v. Herschell.....	686	Martin v. Delaware Ins. Co....	750
Livingston v. Livingston	737	Martin v. Dwelly.....	446
Livingston v. New York {	173, 177	Martin v. Harrington.....	757
	188, 348	Martin v. Hawks.....	754, 756
	383	Martin v. Marshall.....	666
Lockley v. Eldridge.....	521	Martin v. Martin.....	484
Lockwood v. Stradley.....	508	Martin v. Reeves.....	197
Lockwood v. Sturdevant.....	692	Martin v. Rex.....	479
Logan v. Richardson	477	Martin v. Wagner.....	264
Long v. Towl.....	122	Mason v. Baker.....	450
Long v. Lanning.....	241	Massie v. Sebastian.....	445
Loomer v. Wheelwright.....	264	Massie v. Walls.....	226
Lord v. Essex Building Ass'n....	113	Mather v. Hood.....	686
Loring v. Mansfield	214	Mather v. Phelps.....	61
Loring v. Norton.....	226	Mathews v. Warner.....	439
Lorymer v. Hollister.....	740	Maughlin v. Perry.....	278
Louden v. Blythe.....	541	Maurer v. Mitchell.....	603
Lowber v. Shaw.....	47	May v. Frayee.....	508
Lowell v. Price.....	206	Mayhew v. Prince.....	47
Lowell v. Trevis.....	204	Maynell v. Saltmarsh.....	126
Loweree v. City of Newark	374	Mayor etc. of Hagerstown v.	
Lowndes v. Chisholm.....	387, 393	Schner.....	112, 113
Lowrie v. Bourdieu.....	387	Mayor etc. of Lyme Regis v.	
Lowry v. Coulter.....	489	Henley.....	127
Ludden v. Leavitt.....	488	Mayor of N. Y. v. Bailey.....	373
Luddington v. Peck.....	699	Mayrant v. Richardson.....	537
Ludlow v. Johnson	72, 373, 638	McAlexander v. Wright.....	740, 744
Ludlow v. Simond.....	297	McCartee v. Orphans' Society..	682
Ludwig v. Highley.....	545	McCauley v. Weller.....	372
Lunt v. Whitaker.....	35	McClain v. Todd's Heirs.....	65
Luttrel v. Olmins.....	639, 640	McClenachan v. Curwen.....	373
Lyman v. Lyman.....	486	McClure v. Miller.....	642
Lynall v. Longbothom.....	191	McClures v. Hammond.....	746, 751
Lynch v. McNally.....	310	McCool v. Jenkins	285
Lynch v. Postlethwaite	52, 270	McCord v. People.....	306
Lyndell v. Longbottom.....	191	McCorkle v. Binns	772, 780
Lynn v. Bruce.....	654	McCormick v. Sullivan.....	691
Lyon v. Alvord.....	765	McCraney v. Alden.....	271
Lyon v. Jerome.....	372	McCullough v. Guefner.....	740
Lyon v. King.....	145	McCullough v. Guetner.....	740
Lyon v. Richmond.....	385, 388	McDonald v. Napier... ..	755, 756, 758
Lyte v. Penny	647	McDonald v. W. R. R. Corp....	303
Macalley, <i>In re</i>	462	McDougall v. Claridge.....	223
Macdonald v. English.. ..	132	McDowell v. Van Denson.....	686
MacFarlane v. Price.....	204	McGehee v. Hill.....	706
Mackinley v. McGregor.....	513	McGowen v. Whitesides.....	135
Magill v. Kauffman... ..	52	McGuire v. Gadsby.....	675
Magoffin v. Holt.....	278	McGuire v. Kouns.....	437
Magoun v. Lapham.....	154	McHugh v. Malony	489
Magwood v. Johnston.....	571	McIlvaine v. Kadel.....	295
Malone v. Samuel.....	166	McIntyre v. Oliver.....	414
Malpica v. McKeown.. ..	270	McIntyre v. Ward.....	541
Manby v. Scott.....	528, 530	McKee v. Hicks.....	420
Mansfield v. Dorland.....	757	McKee v. Owen	213
Mansfield v. Mansfield.....	508	McKeen's appeal	522
Manufacturers' Bank v. Winship.	623	McKenny v. Rhodes	42
Many v. Jagger.....	205	McKinney v. Rhoads	42
		McKinstry v. Solomons	672

	PAGE		PAGE
McMenomy v. Murray	646	Morgan v. Morgan	246, 247
McMenomy v. Roosevelt	646	Morgan v. Richards	463
McMurray v. Montgomery.	581	Morris v. Coleman	122
McNamara v. Rogers	765	Morris v. Morange	274
McNeil v. Bird's Adm'r	669	Morris v. Mowatt	256
McPherson v. Cunliff, 62, 682, 687,	693	Morrison v. Beckwith	518
McWilliams v. Long	278	Morrison v. Blodgett	64
Meade v. St. Louis M. L. L. Co.	270	Morrison v. Poyntz	695
Medbury v. Watrous	295	Morrison v. Wurtz	497
Mellon v. Guthrie	513	Morrow v. Campbell	722
Mellon's appeal	545	Morrow v. Wood	419
Melville v. De Wolf	520	Morse v. Stocker	150
Melvin v. Whiting	39	Morse v. Welton	119
Memphis v. Wright	373	Moses v. Murgatroyd	43, 45
Menges v. Oyster	457	Mott v. Hicks	719
Mercer street, <i>In re</i>	383	Murphy v. Bottomer	601
Merchants' Bank v. Cook	164	Murphy v. De Groot	374
Meredith v. Benning	470	Mutlett v. Hutton	560
Merrick v. Gordon	382	Mutual Ass. Soc. v. Stanard	644
Merrick v. Mayor of Baltimore.	375	Myers v. Byerly	448
Merritt v. Fleming	603		
Merritt v. N. R. R. Co.	373	Nailer v. Stanley	518
Messier v. Amery	686	Nass v. Van Swearingen	182
Mestaer v. Gillespie	639	Naylor v. Wench	394
Metcalfe v. Shaw	528	Naylor v. Winch	394
Meux v. Howell	646	Neely v. Grantham	502
M. & H. R. R. Co. v. Niles	382	Neilson v. Blight	43
Miffin v. Workman	517	Nelson v. Harwood	445
Milarkey v. Foster	132, 134, 135	Nesbitt, <i>Ex parte</i>	755, 759
Miles v. Oden	270	Newbaker v. Alricks	757
Milhan v. Sharp	132	Newbert v. Cunningham	756
Miller v. Hughes	382	Newbold v. Wright	300
Miller v. Kennedy	672	Newburgh Turnpike Co. v. Miller	345
Miller v. Mariners' Church	52	Newell v. Hoadley	749
Miller v. Steam N. Co.	303, 555	Newell v. Nichols	295
Miller v. Stewart	297, 674, 676	Newlands v. Chalmer's Trustees.	266
Miller v. Tiffany	271	New London Bank v. Lee	45
Mills v. Duryee	686	Newman v. Chapman	283
Mills v. Hall	132	New Orleans I. & G. N. R. R. Co.	
Milward v. Thatcher	174	v. Moyer	188
Mitchel v. Reynolds	120	Newton v. Newton	686
Mitchell v. Eyster	434	Newton v. Rouse	521
Mitchell v. Hazen	615	Nichol v. Bate	589
Mitchell v. Johnson	615	Nichols v. Pool	759
Mitchell v. Morrison and Pen-		Nicoll v. Mumford	650
rod	470, 472	Nicoll v. Nicoll	754
Mitchell v. Oldfield	754, 756	Niolon v. Douglas	657
Mitchell v. Ryan	435	Niven v. Belknap	702
Mitchell v. Smith	462	Nixon v. Hyserott	692
Mitchell v. Stavely	672	Noe v. Purchapile	590
Mode's appeal	545	Nomangue v. People	576
Monell v. Monell	578	Norris v. Abingdon Academy	100
Montague v. Benedict	528	North v. Barnum	607
Montefiori v. Montefiori	483	North v. Turner	650
Montgomery & West Point R. R.		Northey v. Burbage	505
Co. v. Edwards	556	Norton v. Turvill	510
Moody v. Fiske	204	Nowlin v. Foster	197
Moore v. White	688	Noyes v. Anderson	285
Moore v. Fitchburgh R. R. Co..	161	Nugent v. State	598
Moore v. Hitchcock	199	Nunn v. Wilsmore	646
Moore v. Kelly	39, 450	N. Y. Dry Dock v. Am. L. Ina. &	
Moore v. Mich. C. R. R. Co.	555	T. Co.	271
Moore v. Tisdale	432		
Morange v. Morris	277	O'Brien v. Norwich etc. R. R. Co.	132

CASES CITED.

23

	PAGE		PAGE
O'Connor v. O'Connor	517	Pendleton v. Gunston.....	472
Odes v. Woodward.....	645	Pendleton and Wife v. Fay.....	692
Odiorne v. Winkley.....	204	Penington v. Coats.....	498
Ogden v. Walters.....	437	Penny v. Block.....	382
Olcott v. Supervisors.	372	Penrod v. Mitchell.....	470, 472
Olcutt v. Bynum.....	256	Pentz v. Staunton.....	49
Oliver v. Chamberlin.....	629	People v. Alcot.....	597
Oliver v. Court.....	580	People v. Ambrecht.....	373
Oliver v. Maryland Ins. Co.	749	People v. Barrett.....	594
Oliver v. Pray.....	642	People v. Brannigan.....	576
Oliver v. Worcester.....	161	People v. Canal Com'rs.....	372
Onions v. Tyrer.....	394	People v. Croswell.....	218, 223
Onslow v. Horne.....	768	People v. Godwin.....	597
Ontario Bank v. Hennessey.....	382	People v. Goodwin.....	593, 597
Ormerod v. Tate.....	754, 756, 759	People v. Hayden.....	372
Orr v. Quimby.....	373, 374, 375	People v. Kerr.....	372
Osbaldiston v. Sampson.....	601	People v. Law.....	372
Osborn v. Bank of United States. 739		People v. Manning.....	140
Osborne v. Moss.....	484	People v. Mayor of Brooklyn....	372
Ostrander v. Brown.....	298, 303, 752	People v. Olcott.....	597
Onseley v. Carroll.....	564	People v. Platt.....	338
Overton v. Lackey.....	180	People v. Plummer.....	576
Owings v. Hull.....	186	People v. Rensselaer & S. R. R.	
Owings v. Owings.....	458	Co.....	113
Ozanne v. Haber.....	601	People v. Stetson.....	306
		People v. Supervisors.....	372
Page v. Broom.....	653	People v. White.....	372
Page v. Page.....	431	People's Bank v. Mitchell.....	277
Paget, Lord, <i>In re</i>	544	Perkin v. Proctor.....	180
Paine v. Partrich.....	125	Perkins v. Clay.....	122
Paine v. Patrich.....	125	Perkins v. Dibble.....	437, 446
Palmer v. Miller.....	295	Perkins v. Fairfield.....	687, 688
Palmer v. Stebbins.....	122	Perkins v. Hasdell.....	278
Paradine v. Jane.....	519	Perkins v. Washington Ins. Co..	719
Park v. Little.....	206	Perrott v. Perrott.....	394
Parker v. Kett.....	182	Perry v. Hewlett.....	706, 709, 721
Parker v. Stiles.....	205	Perryman, <i>In re</i>	568
Parker v. Way.....	603	Peter v. Compton.....	143
Parkist v. Alexander.....	255	Petrie v. Clark.....	544
Parmelee v. Oswego & S. R. R.		Philips v. Biron.....	702
Co.....	372	Philips v. Bury.....	90
Parsons v. Handy.....	303	Phillips v. Green..	283, 289, 291, 295
Partenheimer v. Van Order.....	312	Phillips v. Jansen.....	559
Paschals, <i>In re</i>	759	Phillips v. Page.....	205
Patapsco Ins. Co. v. Southgate..	551	Phillips v. Stevens.....	138, 139
Pateshall v. Apthorp.....	623	Pickett v. Loggon.....	442
Patten v. Smith.....	450	Pierce v. Bartrum.....	122
Patterson v. Magwood.....	570	Pierce v. Bertram.....	122
Pattison v. Blanchard..	382	Pierce v. Fuller.....	122
Pavey v. Burch.....	752	Pigatt v. Thompson.....	458
Paxton v. Freeman.....	156	Pike v. Thomas.....	122
Payne v. McKinlay.....	132, 133	Pillsbury v. Dugan.....	435
Payne v. Parker.....	541	Pinder v. Morris.....	754
Peake v. Oldham.....	774	Pinkerton v. Easton.....	759
Pearle v. Folsom.....	180	Pinney v. Ashley.....	278
Pearson v. Duckham.....	694	Pittsburgh v. Scott.....	132, 135
Pearson v. Johnson.....	375	Place v. Union Express Co.....	303
Peart's Heirs v. Taylor's Dev-		Platner v. Best.....	686
isees.....	193	Platt v. Stewart.....	274
Peaslee v. Barney.....	484	Pleasants v. Pendleton.....	39, 450
Peirce v. Bent.....	756	Pleasants v. Ross.....	673
Pemberton, <i>Ex parte</i>	759	Plymouth, Countess of, v. Throg-	
Pemberton v. Parke.....	504	morton.....	519
Pemberton Co. v. N. Y. C. R. R. Co.	556	Poindexter v. McCannon.....	626

	PAGE		PAGE
Pollard v. Shaaffer.....	140	Rex v. Brotherton.....	462
Polly v. Saratoga & W. R. R. Co.	373	Rex v. Burdett.....	559
Pomeroy v. Ainsworth.....	271	Rex v. Collingbourne.....	230
Pomeroy v. Mills.....	188	Rex v. Downs.....	682
Porter v. Bleiler.....	295	Rex v. Everton.....	231
Porter v. Chicago & Rock I. R. R. Co.....	555	Rex v. Hardwick.....	231
Porter v. Havens.....	601	Rex v. Heath.....	231
Porter v. Hill.....	615	Rex v. Inhabitants of Glamorgan- shire.....	425
Porter v. Moores.....	581	Rex v. Inhabitants of Whitnash.....	463
Pottinger v. Wightman.....	439	Rex v. Leake.....	148
Powell v. Harper.....	221	Rex v. Lloyd.....	147, 170
Powell v. Pennsylvania R. R. Co.	556	Rex v. Much Cowaine.....	232
Powell v. Waters.....	587	Rex v. Much Cowarne.....	232
Power v. Kent.....	756	Rex v. Offchurch.....	230
Powers v. Bears.....	374	Rex v. Rhodes.....	180
Preston v. Bowmar.....	226	Rex v. Roach.....	230, 231
Price v. Hunt.....	411	Rex v. Walpole.....	231
Price v. Powell.....	303	Rex v. Whitton.....	230
Price v. Summers.....	604	Rexford v. Knight.....	372
Price v. Tyson.....	197	Reynolds v. Kennedy.....	424
Price, <i>Ex parte</i>	756, 759	Rice v. Austin.....	58
Priester v. Priester.....	569	Rich v. Elliot.....	636
Prince v. McCoy.....	132	Richard v. Chambers.....	570
Pringle v. Pringle.....	484	Richards v. Gilbert.....	746
Prop'r of Canal & Br. Co. v. Gor- don.....	104	Richards v. Meeks.....	591
Prosser v. Edmonds.....	273	Richards v. Walton.....	481
Pulvertoft v. Pulvertoft.....	650, 651	Richardson v. Butterfield.....	166
Pumelly v. Phelps.....	285	Richmond v. Smith.....	301
Pusey v. Desbouvrie.....	186, 387, 394	Riddle v. Prop'r L. and C. on Merrimack River.....	50, 161, 164
Quantock v. England.....	386	Riggs v. Denniston.....	221
Quince v. Callender.....	269	Ringgold v. Ringgold.....	580, 581
Raitt v. Mitchell.....	199	Roach v. Martin's Lessee.....	693
Ramsey v. Stevenson.....	270	Robards v. Wortham.....	399
Ramsey's appeal.....	544	Robb v. Mann.....	497
Randall v. Proprietors.....	52	Robert Fulton, The.....	683
Randle v. Fuller.....	754	Roberts' appeal.....	448
Randolph v. Barber.....	180	Roberts v. Brown.....	221
Rapalge v. Emory.....	686	Roberts v. Burke.....	61
Rathbone v. Budlong.....	719	Roberts v. Dixwell.....	245, 246
Rawson v. Holland.....	303	Roberts v. Havelock.....	520, 521
Rawson's Adm'r v. Copeland...	270	Roberts v. Pierson.....	511
Read v. Com. Ins. Co.....	748	Roberts v. Rockbottom Co.....	145
Read v. Dupper.....	754	Roberts v. Turner.....	751
Read v. Jewson.....	510	Roberts v. Wiggins.....	291, 294, 205
Read v. Robinson.....	545	Robertson v. Kennedy.....	554, 751
Reckner v. Warner.....	375	Robertson v. Reed.....	460
Rector v. Purdy.....	278	Robertson v. Robertson.....	452
Redwood v. Collins.....	693	Robinson v. Bland.....	467
Reed v. Northfield.....	52	Robinson v. Crenshaw.....	603
Reed v. Pruva.....	700	Robinson v. Germyn.....	769
Reed v. Ward.....	517	Robinson v. Hook.....	475
Reeves v. Dougherty.....	612	Robinson v. Zollinger.....	481
Reichart v. Castator.....	197, 484	Rockwell v. Newton.....	519
Reid v. Edwards.....	707	Rodes v. Crockett.....	264
Remington v. Congdon.....	222, 223, 780	Rodney v. Shankland.....	45
Renwick v. Renwick.....	261	Rodgers v. Bradshaw { 318, 336, 337 345, 363	
Respublica v. Dennie.....	224, 780	Rogers v. Collier.....	614
Rex v. Barr.....	147, 174	Rohr v. Kindt.....	457
Rex v. Beare.....	559	Roll v. Raquet.....	601
Rex v. Besse.....	559	Roof v. Stafford.....	290, 291
		Rooney v. S. A. R. Co.....	753

CASES CITED.

25

	PAGE		PAGE
Root v. French	64	Seeley v. Bishop.....	132, 134
Root v. King.....	221	Selfridge, <i>In re</i>	53, 54
Rootham v. Dawson	386	Selin v. Snyder.....	687
Rosa v. Brotherson	589	Selkring v. Davis.....	467
Rose v. Brotherson	589	Service v. Heermance.....	763
Rose v. Himely	683, 686	Seventeenth Street, <i>In re</i>	163
Rose v. Miles	127	Sewall v. Catlin.....	221, 223
Rosevelt v. Bank of Niagara.....	268	Sewell v. Allen.....	298
Rosevelt v. Fulton.....	393	Sexton v. Pike.....	756
Ross v. Henderson.....	411	Seymour v. Brown.....	138
Ross v. Overton	140	Seymour v. Freer.....	256
Rossiter v. Rossiter.....	49	S. F. & A. & S. R. R. Co. v. Crandall.....	372
Rowland v. Milne	303	Shackle v. Baker.....	122
Rowlandson, <i>Ex parte</i>	380	Shaeffer's appeal.....	449
Rudisill v. State.....	374	Shall v. Lathrop.....	285
Rugby Charity v. Merryweather	147	Shaller v. Brand.....	237, 541
Ruggles v. Lawson	650	Shand v. Henderson.....	337, 341
Rumfelt v. Clemens.....	513	Shank v. Shoemaker.	758
Rumril v. Huntington.....	753, 754	Share v. Anderson.....	541
Rung v. Shoneberger	132, 188	Shargold v. Shargold	564
Runyon v. Bordine	132	Sharrington v. Shotton.....	646
Rushford v. Hadfield.....	299, 300	Shaubert v. St. Paul & Sioux R. R. Co.....	132, 135
Russell v. Conway.....	757	Shaw v. Hearnay.....	61
Russell v. Mayor of N. Y.	372	Shaw v. Reed.....	601
Ratland, Countess of, <i>In re</i>	666	Shaw v. Russ.....	432
Rutledge, <i>Ex parte</i>	522	Shearer v. Com'rs of Douglas Co.	375
Ryer v. Atwater.....	686	Shearick v. Huber.....	480
Sackett v. Giles.....	261	Shearman v. Akins.....	215
Sage v. Gittner.....	302	Sheets v. Selden's Lessee.	202
Salter v. Kidgley.....	540	Sheffield v. Watson.....	719
Samuel v. Howarth.....	297	Sheldon v. Aland.....	642
Samuell v. Howarth.....	297	Shelton v. Cocke.....	414
Sanborn v. Belden.....	375	Shepherd v. Jackson.....	166
Sandby, <i>Ex parte</i>	521	Shepherd v. Lanfear.....	116
Sandford v. McLean.....	256, 264	Shepherd v. McEvers.....	43, 45
Sanford v. McLean.....	289	Sherk v. Endress.....	545
Sarch v. Blackburn.....	307, 308	Sherman v. Abell.....	521
Saunders v. Gatlin.....	404	Sherman v. Boyce.....	700
Savacool v. Boughton...156, 667,	702	Sherman v. Garfield.....	295
Savile v. Jardine... ..	768	Shivers v. Wilson.....	691
Savory v. Price.....	204	Shollenberger v. Filbert.....	452
Saxton v. Chamberlain	686	Shotwell v. Murray	385, 388
Sayles v. Smith.....	465	Shuman v. Shuman.....	465
Scarfe v. Morgan.....	759	Shumway v. Rutter.....	39, 58, 450
Scheland v. Erpelding.....	519	Shumway v. Stillman.....	481
Schieffelin v. Harvey... ..	554, 746	Sickles v. Pattison.....	521
Schlosser's appeal.....	513	Sickman v. Sapsley	484
School Dist. No. 1 v. Douchy....	140	Siffkin v. Walker.....	413
Schriever v. Cobean.....	448	Simms v. Memphis C. & L. R. R. Co.....	375
Schroeder v. Hudson Riv. R. R. Co.....	303	Simpson v. Feltz	382
Schutt v. Large.....	283	Sinclair v. Bowles.....	520
Schwartz v. Saunders.....	140	Singer v. Walmsley.....	206
Scofield and Taylor v. Day.....	269	Singletary v. Carter.....	704
Scott v. Grenough.....	496	Singleton v. Carroll.....	707
Scott v. Hancock.....	688	Six Carpenters' case	212, 367
Scott v. Kittanning Coal Co.....	521	Skelding v. Hought	587
Scott v. McLellan.....	47	Skelding v. Warren.....	587
Scudder v. U. N. B.....	271	Skinnerads. Powers.....	221
Scull v. Reeves.....	657	Skinner v. Sweet	755, 756
Scurfield v. Howes.....	580	Skipwith v. Strother.....	656
Searle v. Keeves.....	57	Slater v. Mersereau.....	312
Seaving v. Brinkerhoff.....	654		

	PAGE		PAGE
Slee v. Bloom.....	107	State v. Connor	598
Small v. Woods.....	479	State v. Curtis	598
Smith v. Alvord.....	271	State v. Dawson.....	373
Smith v. Bank of Washington....	650	State v. De Witt.....	52
Smith v. Bell and Wife.....	582, 583	State v. Ferguson.....	58
Smith v. Birmingham etc. Gas- light Co.....	160	State v. Graves.....	375
Smith v. Claxton.....	399	State v. Hayden.....	191
Smith v. Cutler.....	673	State v. Mayor etc. of Mobile..	713
Smith v. Ely.....	204	State v. McKee.....	576, 598
Smith v. Lewis.....	274	State v. Merrill Miller.....	574
Smith v. Lowry.....	686	State v. Mizner	419
Smith v. Martin.....	201	State v. Rhodes	419
Smith v. Pelah.....	309	State v. Rollins.....	218
Smith v. Pinney	601, 603	State v. Stalcup	419
Smith v. Plummer.....	47	State v. Town of Hampton..	324, 345
Smith v. Shepard.....	157	State v. Trask	150, 188
Smith v. Sherwood	686	State v. Turrell	218
Smith v. Smith.....	104, 535	State v. Vinson	399
Smith v. Taylor.....	373	State v. Wakely.....	686
Smith v. Tonstal.....	470	State v. Waterhouse	597
Smith v. Ward.....	541	State v. Wells.....	56
Smith v. Whiting	686	Stearns v. Swift	431
Smith v. Wright.....	382	Steele v. Boyd.....	675, 676
Smock v. Dade.....	704	Steele v. Williams	549
Smyrl v. Niolon.....	554, 752	Steinman v. Ewing	513
Smyth, <i>Ex parte</i>	517, 518, 519	Stephens v. Vaughan	707
Soam v. Bowden.....	521	Sterling, <i>Ex parte</i>	759
Society etc. v. New Haven....	90, 92	Sterling v. Sherwood	221
Soden v. Soden.....	670	Sternburg v. Cullanan	614
Solomons v. Jones.....	140	Sterricker v. Dickinson	256
Somes v. Skinner.....	62	Stetson v. Kempton	149
Sorrey v. Bright.....	440	Stetson v. Faxon	158, 161
Soule v. Bonney.....	603	Steuart v. Mayor and City Coun- cil of Baltimore	374
Southby v. Stonehouse.....	507	Steuben Co. Bank v. Mathewson	601
Southward Bank v. Common- wealth.....	541	Stevens v. Lynch.....	387
Southworth v. Sebring.....	565	Stevens v. Prop'rs of Middlesex Canal	343
Spackman v. Ott.....	545	Stevens v. Robbins	47
Sparhawk v. U. P. R. R. Co....	465	Stevenson v. Blackelock.....	759
Sparks v. Hess.....	202	Stewart v. Flowers.....	757, 758
Spencer v. Southwick.....	221	Stewart v. Iglehart	216, 670
Sprague v. Stevens.....	138	Stewart v. Russell.....	746
Sprigg v. Beaman.....	263	Stokes v. Dawes.....	208
Sprigg v. Braman.....	263	Stone v. Macnair	528
Stackpole v. Arnold.....	47	Stone v. McNair.....	528
Stafford v. Coyney.....	147	Stone v. State.....	576
Stahl v. Berger.....	422	Stone v. Stevens.....	52
Standifer v. Doulin.....	742	Storr v. Crowley.....	298, 302
Stanley v. Bank of America.....	691	Storrs v. Barker.....	385, 388
Stapleton v. Conway	267	Story v. Elliot	465
Stark v. Barrett.....	617	Stovall v. Banks.....	274
Stark v. Hunton.....	234	Stow v. Convers.....	221, 780
Stark v. McGowen.....	331	Stratton v. Hussey.....	756
Starke v. McGowan	331	Street v. Meadows.....	416
Starke's Ex'rs v. Littlepage....	660	Strickland v. Aldridge.....	639
Starr v. Jackson.....	65	Stuart v. Laird.....	345
Starr v. Leavitt.....	615	Stuck v. Mackay.....	502
State v. Alford.....	419	Sturges v. Buckley.....	750
State v. Avery.....	218, 561	Sturtevant v. Ballard.....	450
State v. Black.....	419	Sullivan v. Redfield.....	205
State v. Brooks.....	598	Sumner v. Parker.....	688
State v. Burton	419	Sumner v. Summers.....	601
State v. Catlin	188	Sutton v. Johnstone.....	424

CASES CITED.

27

	PAGE		PAGE
Suydam v. Marine Ins. Co.....	749	Tompkins v. Dudley.....	140
S. & V. R. R. v. City of Stock-		Toulmin v. Heidelberg.....	432
ton.....	372	Touro v. Cassin.....	270
Swails v. Bushart.....	585	Town of Hinesburgh v. Sumner .	633
Swain v. Senate.....	754	Town of Pawlet v. Clark.....	171
Swasey v. Mead and Chase.....	631	Townsend, <i>In re</i>	372
Sweet v. Bartlett.....	758	Townsend v. Bogart.....	382
Swift v. Dean.....	616	Townsend v. Hill.....	519
Swift v. Thompson.....	450	Townson v. Tickell.....	647
Swift v. Whisen.....	206	Treasurers v. McDowell.....	704
Swindler v. Hilliard.....	556	Trott v. Wood.....	750
Sykes v. Sykes.....	136	Troup v. Haight.....	265
		Trowbridge v. Wetherbee.....	145
Taft v. Brewster.....	719	Troxdale v. State.....	576
Tarbox v. Hartenstein.....	519	Trustees v. Bradbury.....	113
Tarlton v. Fisher.....	666	Trustees v. Foy.....	113
Tate v. Hilbert.....	564, 565	Trustees of Pres. So. v. A. & R.	
Tatman v. Strade.....	191	R. R. Co.....	372
Taul v. Campbell.....	62	Trustees of Vernon Soc. v.	
Taw v. Bury.....	647	Hills.....	111, 113
Tawe, <i>In re</i>	647	Trustees of Watertown v. Cowen.	188
Taylor v. Benham.....	256	Tucker v. Moreland.....	292
Taylor v. Blanchard.....	122	Tufts v. Tufts.....	633
Taylor v. Bradley.....	285	Turner v. Bank of America.....	691
Taylor v. Carpenter.....	137	Turner v. Belden.....	197
Taylor v. Cole.....	702	Turner v. Fisher.....	585
Taylor v. Hampton.....	175	Turner v. Plowden.....	274
Taylor v. Porter.....	372	Turner v. Winter.....	204
Taylor v. Shufford.....	62	Turney v. Wilson.....	303, 584, 751
Teal v. Fonda.....	325	Turwin v. Gibson.....	755, 756
Teel v. Fonda.....	325, 333	Tuttle v. Reynolds.....	606
Teese v. Phelps.....	206	Tuxworth v. Moore.....	39
Ten Eick v. Simpson.....	277	Tyburn v. Slade.....	437
Tenney v. Mulvaney.....	521	Tyler v. Sturdy.....	150
Tenny v. Beard.....	226		
Terrel's Heirs v. Cropper.....	484	Udell v. Kenney.....	259
Tewkesbury v. Magraff.....	607	Ulp v. Campbell.....	432
Texira v. Evans.....	420	Underwood v. Stuyvesant...172,	177
Thacher v. Dinsmore.....	719	Union Bank of Tennessee v. Jol-	
Thatcher v. Gammon.....	686	ly's Adm'rs.....	693
Thatcher v. Powell.....	691	Union Paper Bag Co. v. Nixon..	206
Thayer v. Boston.....	132, 150, 161	United States v. Coolridge.....	593
Theal v. Theal.....	665	United States v. Haskell and	
Therman v. Abell.....	521	Francois.....	593, 595
Thomas v. Croswell.....	224	United States v. Perez.....	593, 595
Thomas v. Garvan.....	405	United States v. Wiltberger..53,	54
Thomas v. Scruggs.....	581	University of Vermont v. Buell.	627
Thomas v. Sheppard.....	260	Upshaw v. Upshaw.....	662
Thompson, <i>Ex parte</i>	756	Urquhart v. Barnard.....	748
Thompson v. Grand Gulf R. R. &			
B. Co.....	375	Valentine v. Boston.....	150
Thompson v. Lacy.....	210	Van Arsdale v. Van Arsdale....	237
Thompson v. Leach....292, 293,	647	Van Bergen v. Van Bergen..713,	715
Thompson v. McGaw.....	473	Vanderzee v. McGregor.....	223, 224
Thompson v. McKissick.....	583	Vandyke v. Christ.....	545
Thompson v. O'Hanlan.....	481	Van Epps v. Van Deusen.....	260
Thompson v. Tolmie.. { 180, 434,	684	Van Nostrand v. Wright.....	295
	685, 689	Van Orden v. Van Orden.....	665
Thomson v. Carpenter.....	137	Van Rensselaer v. Radcliff.....	65
Thorley v. Lord Kerry.....	767, 773	Van Riper v. Van Riper.....	465
Thorn v. Blanchard.....	223	Van Santvoord v. St. John.....	302
Thorogood v. Marsh.....	555	Van Wyck v. Norvell.....	589
Tilghman v. Mitchell.....	206	Varrick v. Smith and Attorney-	
Tobias Watkins' case.....	763	general.....	316, 373

	PAGE		PAGE
Vaughn v. Dotson...	576	Wayland v. Elkins	381
Venard v. Cross.....	132, 134	Wayne v. Holmes	205
Vick v. Mayor etc. of Vicksburg.	188	Weatherston v. Hawkins.....	559
Villa Real v. Galway.....	233	Webb v. England.....	521
Villers v. Mansley	770	Weber v. Clark	519
Vincent v. Cornell.....	36	Webster v. Coffin	162
Vincent v. Groom.....	604	Webster v. County Com'rs of Baltimore Co.....	113
Vis. and Govs. of St. John's Coll. v. Comptroller and Treasurer..	112	Webster v. Hall.....	541
Voorhees v. Presbyterian Church.	256	Webster v. Van Steenbergh	283
Voorhees v. U. S. Bank..	{ 434, 689 690, 762	Wellington, <i>In re</i>	373
Voorhees v. Voorhees.....	295	Wells v. Calnan	140
Vose v. Handy.....	227	Wells v. Hatch	757
Wade v. Haycock.....	521	Wells v. McCall.....	502
Wadleigh v. Glines	446	Wells v. Mitchell.....	411
Waite v. Hundred of Stoke.....	462	Welsh v. Carter	61
Waland v. Elkins.....	381	Welsh v. Hole.....	754, 755
Walden v. Sherbourne.....	414	Wendell v. Jackson.....	154
Wales v. Willard.....	688	Wenman v. Mohawk Ins. Co. ..	116
Walker v. Greene.....	140	Wesley v. State	576
Walker v. Sargeant..	756, 757	Wesson v. Washbourne Iron Co.....	132, 161
Walker v. Swartout.....	719	West Bridge R. Co. v. Dix	373
Walker v. Transportation Co....	555	Westervelt v. Pinckney.....	490
Walker v. Walker.....	475	Weston, <i>In re</i>	682
Wallace v. Coston.....	513	Wetherill v. Mecke.	513
Wallace v. Hardacre.....	601	Wetmore v. Kessain	295
Wallace v. Karlenowefski	372	Wetmore and Cheesebrough v. Baker and Swan.....	378
Waller v. Todd.....	216	Wheaton v. East	295
Walls v. Ward.....	585	Wheaton v. Wheaton	388
Wallwyn v. Coatts.....	651, 652	Wheaton v. Essex Public Road .	375
Wally's Heirs v. Kennedy.....	113	Wheeler v. Raymond	763
Walther v. Warner.....	374	Wheelock v. Pratt.....	328, 337
Walton v. Dickerson.....	751	Wheelwright v. Depuyster	264
Walton v. Robinson.....	416	White v. Carpenter.....	254
Walton v. Waterhouse.....	138	White v. Cuyler.....	719
Ward v. Allen.....	603	Whiting v. Earle	119
Ward v. Johnson.....	675	Whitney v. Dutch	291
Ward v. McCauley.....	547, 549	Whitney v. Emmett.....	206
Ward v. McIntosh.....	435	Whitney v. Mowry.....	206
Ward v. Reynolds.....	774	Whitney v. Peckham.....	424
Ward v. State.....	598	Whitney v. Slayton.....	122
Ward v. Turner.....	411, 564	Whittington v. Polk.....	98
Wardell v. Honell.....	589	Whitwell v. Vincent.....	36
Wardell v. Howell.....	589	Wickes v. Caulk.....	691
Warfield v. Campbell.....	757, 758	Wickes v. Clarke.....	261
Warner v. Caulk	515, 516	Wilbur v. Beecher.....	204
Warr v. Jolly.....	222, 223	Wilder v. Keeler.....	273
Warren v. Leland.....	488	Wiley v. State.....	576
Washabaugh v. Entriken.	452	Wiley and Gayle v. White and Leslie.....	692, 693
Waterman v. Johnson.....	152	Wilkes v. Harper.....	264
Waters v. Grace.....	756	Wilkes v. Hungerford Market Co.....	128, 129
Watertown v. Cowen.....	150	Wilkins v. Carmichael.....	754, 755
Watkinson v. Loughton.....	746	Wilks v. Back.....	719
Watson v. Bailey.....	537, 541	Willan v. Willan.....	386, 394
Watson v. Jacobs.....	614	Williams, <i>In re</i>	125, 132
Watson v. Mercer.....	541	Williams' appeal.....	513
Watson v. Trask.....	561	Williams v. Bailey.....	601, 602
Watson v. Watson.....	763	Williams v. Blunt.....	691
Watt v. Potter.....	47	Williams v. Branson.....	751
Watts v. Ball.....	241		
Watts v. Kinney	263		

CASES CITED.

29

	PAGE		PAGE
Williams v. Brown.....	646	Woodcock v. Parker.....	204
Williams v. Grant ... {	554, 746, 747	Woodgate v. Knatchbull.....	491
	748, 752	Woodhall v. Holman.....	587
Williams v. Hicks.....	737	Woodhull v. Holmes.....	587
Williams v. Jones.....	583	Woodmester v. Walker.....	501
Williams v. N. Y. C. R. R. Co..	372	Woodward v. Landon.....	223
Williams v. Reed and Trustee...	214	Woodward v. Morrison.....	206
Williams v. Robbins.....	49	Woodworth v. Bank of America.	422
Williams v. Smith132, 134,	135	Woodyer v. Hadden.....	147
Willing v. Peters.....	502	Workman v. Mifflin.....	517
Willison v. Watkins.....	606	Wormley v. Lowry.....	589
Wills v. Cowper.....	467	Worrall v. Johnson.....	759
Wills v. Sayers.....	241	Worthington v. Hayley.....	226
Wilson v. Collins.....	220	Worthington v. Hylyer.....	226
Wilson v. Harrisburg Bank.....	541	Wright v. Bates.....	626
Wilson v. Lord Townshend.....	662	Wright v. Burroughes.....	758
Wilson v. Round.....	756	Wright v. De Kline.....	686
Wilson v. Wilson.....	475	Wright v. Johnson.....	297
Wilsons v. Bibb.....	65	Wright v. Johnston.....	297
Wilt v. Franklin.....547,	650	Wright v. Miller.....	274
Wingfield v. Crenshaw.....	713	Wright v. Ryder.....	122
Winne, <i>In re</i>	261	Wyeth v. Stone.....	205
Winslow v. Leonard.....	450	Wylie v. Cox.....	756
Winterbourne v. Morgan.....	212	Wyman v. New York172,	383
Wintermute v. Redington.....	205	Wyndham v. Wyndham.....	687
Wisner v. Bardwell.....	601		
Witbeck v. Holland.....	303	Yarborough v. Bank of England.	160
Withers v. Reynolds.....	521	Yarnall's will.....	440
Wood v. Braddick.....414,	415	Yolo Co. v. Sacramento.....	132
Wood v. Chapin.....	283	Young v. Black.....	686
Wood v. Underhill.....205,	206	Young v. Gregory.....	686
Wood v. Veal.....	170		
Woodard v. Dowsing.....	771	Zinn v. N. J. Steamboat Co.....	303
Woodbury v. Long.....	39	Zouch v. Parsons.....290,	292
Woodcock v. Bennet.....	698		

AMERICAN DECISIONS.
VOL. XXXI.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

LANE v. BORLAND.

[14 MAINE, 77.]

PURCHASE FROM CONDITIONAL VENDEE OF CHATTEL.—Where a contract for the sale of a chattel is entered into, and the property is delivered upon condition that the title shall not pass until payment in certain installments shall be fully made, but that the vendee in the mean time is to have possession, the vender giving a bill of sale making no mention of the condition, and stating that he warrants the property free from “incumbrances and that he has received payment by notes,” and the purchaser giving back a written acknowledgment containing a full statement of the conditions of the bargain, this constitutes a conditional sale, and the title remains in the vendor until payment; and if the transaction is free from fraud, a subsequent *bona fide* purchaser from the vendee before the condition is complied with, having no notice of the condition, but relying on the bill of sale, gets no title as against the conditional vendor, and is liable in trover after a demand.

IF SUCH TRANSACTION BE REGARDED AS A SALE AND MORTGAGE back, the mortgage must nevertheless prevail against a *bona fide* purchaser from the mortgagor in possession, though he has no notice of the mortgage.

TROVER for a horse. From an agreed statement of the facts, it appeared that the plaintiff, who was admitted to have been the former owner of the horse, agreed in January, 1834, to sell him to Washburn & Fling for a certain sum, payable in two equal installments in March and June, 1834, respectively, the purchasers to have possession until they should fail to pay as agreed, but the title to remain in the vendor until payment. The plaintiff on the same day gave the purchasers a bill of sale stating that they “bought” the said property from him, that he “warrants the horse to be free from all incumbrances,” and that he “has received payment by notes.” Washburn & Fling

at the same time gave the plaintiff a written acknowledgment, certifying that they "bought" the horse of him, and that he was to remain in their hands until the plaintiff should receive his pay; that then the said horse should be their property, otherwise to be the property of the plaintiff, and stating the amounts to be paid and the times of payment. The plaintiff could prove by parol, if admissible, that he refused to sell the horse to said parties without security, that he was to continue to own the horse until payment, and that until then they should not sell him. Payment was never made. Washburn & Fling nevertheless sold to Vickory, for value, exhibiting to him the bill of sale, upon the strength of which he purchased, having no notice of the incumbrance, and Vickory afterwards sold to the defendant, who also bought without notice, and refused to deliver the horse to the plaintiff when demanded. A nonsuit or default was to be entered, according to the opinion of the court upon these facts..

E. Brown, for the plaintiff.

J. Appleton, for the defendant.

By Court, WESTON, C. J. The evidence of the contract between the plaintiff and Washburn & Fling, is to be found in the paper given by him to them, of the fourth of January, 1834, and in that given by them to him of the same date. They both relate to the same transaction, executed at the same time, and are to have the same effect, as if incorporated in the same instrument. It was not a mode of doing business much to be approved; but it was sufficient between honest men. Whatever apparent contradiction there may be in the instruments taken together, it is manifest that the intention of the parties was, that the property should remain in the plaintiff, until he was paid the price. It was a conditional sale; a contract for a sale, not consummated.

But if it was to be regarded as a sale, it must be held that there was, at the same time, a mortgage back to secure the consideration. In the one case, the property would not pass, except upon payment; in the other, it would operate as a reconveyance to the plaintiff, until he was paid his price. Both modes of transacting the business, when free from fraud, have been sanctioned by judicial decisions, as appears by the cases cited for the plaintiff. The mortgage of personal property, the mortgagor remaining in possession, has been resisted as tending to give false credit, and to deceive purchasers; but their

validity has been too firmly established, to be shaken, without the interposition of the legislative power. And it has been held, in *Lunt et al. v. Whitaker*, 1 Fairf. 310, that a mortgage of this kind shall prevail against a *bona fide* purchaser, who had no notice of it, or reason to suspect its existence.

Without resorting in this case to the parol evidence, which it is agreed exists, if admissible, we perceive no reason to doubt that the transaction was fair, and free from fraud on the part of the plaintiff. It does not appear that he had any reason to suspect, that Washburn & Fling would make the fraudulent use they did of the bill of sale he gave them. It was a fraud upon him, as well as upon the purchaser, bringing into jeopardy the interest of both, and subjecting them to the hazard and expense of a lawsuit. But it is said the plaintiff ought to lose his horse; because by his bill of sale, he enabled Washburn & Fling to commit a fraud. This consequence could not have been meditated or designed by him. If he had even suspected it, a regard to his own interest would have withheld him from giving it. It contributed to enable Washburn & Fling to deceive a purchaser; and purchasers are often deceived by the evidence of property, arising from possession alone, without impairing the title of those who may have intrusted the fraudulent party with such possession. As the law now is, the purchaser of personal property is always exposed to the incumbrance of a secret mortgage. From the bill of sale the purchaser had reason to believe that the former owner of the horse had transferred his title; but he would learn from the same paper that it was not paid for; and he ought to have known that he incurred the hazard of a mortgage, made to secure him or some other person. If the sale had been made in the plaintiff's presence, and he had been silent, he could not afterwards have asserted his claim against the purchaser.

Many cases, some of which have been cited, have turned upon the principle, that if one of two innocent parties is to suffer loss by the fraud of a third, it shall fall upon him who has reposed confidence in the fraudulent party, and enabled him to consummate the fraud. But this principle can not apply to every case which may fall within its range. A bailee may sell the property intrusted to him; but the purchaser thereby acquires no title against the true owner. The mortgagee, by suffering the mortgagor to keep possession, puts it in his power to defraud a subsequent purchaser, notwithstanding which, his mortgage is adjudged good.

The plaintiff has proved property in the horse; either because he has not parted with his original title, or because he has acquired a new one by way of mortgage; and there is no evidence that he has forfeited it, by fraud or otherwise. And the defendant having refused to give up the horse on demand, the opinion of the court is, that the plaintiff is entitled to prevail in this action.

Defendant defaulted.

CONDITIONAL SALE, WHAT IS.—See *Chapman v. Turner*, 1 Am. Dec. 514; *Barrett v. Pritchard*, 13 Id. 449, and note; *Whitwell v. Vincent*, 16 Id. 355; As to the distinction between a conditional sale and a mortgage, as applied to realty, see the note to *Chase's Case*, 17 Id. 300. See also *Bennet v. Holt*, 24 Id. 455.

SALE BY CONDITIONAL VENDEE, EFFECT OF.—See *Barrett v. Pritchard*, 13 Am. Dec. 449 and note; *Whitwell v. Vincent*, 16 Id. 355; *Vincent v. Cornell*, 23 Id. 683, and note.

JEWETT v. LINCOLN.

[14 MAINE, 116.]

SALE OF CHATTELS IS NOT CONDITIONAL where an absolute bill of sale is given acknowledging payment at a stipulated price, although it is provided that in case the vendee sells for more than a specified sum, the vendor is to have the overplus after deducting expenses of sale, and that the vendor is to transport the property to a certain place, free of expense to the vendee.

SALE IS CONSUMMATED IN SUCH A CASE as between the parties, by designating and setting apart the articles for the vendee from the mass of which they are a part.

OF TWO PURCHASERS CLAIMING UNDER BILLS OF SALE EQUALLY VALID, the one first lawfully acquiring possession takes the title.

MARKING OF SHINGLES WITH THE INITIALS OF THE PURCHASER under a bill of sale for a specified quantity out of a larger mass is evidence of a delivery of possession to go to the jury.

EXCEPTIONS TO ERRONEOUS INSTRUCTIONS upon an immaterial point will not be sustained as a ground for a new trial.

TROVER in the common pleas for one hundred thousand pine shingles. The plaintiffs claimed under a bill of sale from one Perry, dated October 24, 1834, stating that the plaintiffs bought of the said Perry "one hundred thousand of pine shingles now on the bank of the Millinocket river, in the East Indian township, so called, in the county of Penobscot, valued at two hundred and fifty dollars;" and that Perry "received payment by credit on said" plaintiffs' "books;" and that Perry agreed to run the shingles to Bangor, as soon as there was sufficient water,

“in good order, and free of expense” to the plaintiffs, and to “deliver the same to them or their agent;” and if the shingles should “sell for more than two hundred and fifty dollars,” the plaintiffs were to allow him “the overplus, after taking out the expense of selling.” It appeared that the shingles were cut by Perry under a written permit from one Ramsdell, the owner of the land, which was produced by the plaintiffs on the trial, but there was no direct evidence of the assignment of the permit to the plaintiffs, or of a delivery of the shingles to, or taking possession by, the plaintiffs. But it appeared that prior to April, 1835, as many as one hundred thousand shingles were marked with the letter “W,” which was the initial of the name of one of the plaintiffs’ firm, the firm name being Jewett & Wyman, and that the plaintiffs made claim to the shingles marked “W,” by delivering to an officer who had an attachment in their favor against Perry, the permit and bill of sale above mentioned, with directions not to levy on the shingles marked “W,” but to take possession of them as the plaintiffs’ property. The defendants claimed the shingles under a purchase from one Chase, who had received a bill of sale from Perry, dated September, 1834, stating that Perry sold to Chase “one hundred thousand pine shingles, now lying on the Millinocket stream, up the Penobscot river,” to hold as collateral security for a certain debt for which Chase was holden as surety for Perry, and also for two notes from Perry to Chase. There were other shingles than those marked “W” in the East Indian township, cut by Perry under his permit. Chase took possession in May, 1835, of part of the shingles marked “W,” and sold and delivered them to the defendants. There was contradictory evidence as to whether there was a delivery to Chase under the bill of sale, and the judge left it to the jury to determine, instructing them to return a verdict for the defendants if they should find that there had been a delivery to Chase without notice of the plaintiffs’ claim before the plaintiffs got possession. He also left it to them to say whether, from all the evidence, there had been a delivery to the plaintiffs under their bill of sale. He instructed them also that they might regard the bill of sale as giving the plaintiffs the right to immediate possession. As to the permit above mentioned, he instructed them that if it had been delivered to the plaintiffs to secure them for supplies furnished to Perry, it would give the plaintiffs a lien upon the shingles actually cut under the permit. Verdict for the plaintiff-

iffs, and the defendants brought the case here on exceptions to the rulings of the court.

Kent, for the defendants.

J. Appleton, for the plaintiffs.

By Court, WESTON, C. J. We perceive nothing conditional, in the sale of the shingles in controversy, from Perry to the plaintiffs. The terms of the bill of sale are absolute, and payment is acknowledged. The transfer of the lumber thence resulting, between the parties, is not affected or qualified, by the contingency, under which Perry was to receive an additional consideration. Nor does it appear to us to make any difference, that it was a part of the bargain, that Perry was to perform certain services for the plaintiffs, in the transit of the lumber. It was an agency undertaken and assumed on their account. When the lumber thus sold was designated and set apart from the mass, of which it was a part, the contract of sale was consummated, at least between the parties; and the plaintiffs had a right to take immediate possession.

The defendants also claim under Perry, and by an instrument bearing date near a month prior to the sale to the plaintiffs. The title of Chase, who sold to the defendants, was either as a pledge or a mortgage; or if he was a purchaser, he was liable to account for the proceeds, after paying himself. In determining the questions submitted to us, these transactions may be assumed to have been free from fraud. The two instruments of sale are not necessarily conflicting. There may have been lumber enough both for the plaintiffs and Chase; and there is some evidence to this effect in the case. Regarding the paper given to Chase as evidence of a mortgage, his right would attach as mortgagee, notwithstanding Perry retained the possession, if the quantity expressed in it was severed, and set apart from the aggregate, of which it was a part, prior to the sale and delivery to the plaintiffs, and not otherwise; and the jury have neither found this fact, nor is there any evidence reported to prove it. But as Chase took possession of the lumber, it seems to have been intended that he should hold it, either by way of pledge, or as a purchaser, which some of the terms of the instrument indicate, in which case it must have been understood, that he was to account for its value, beyond what was required for his own security. It is unnecessary, however, to settle whether Chase is to be regarded as a pledgee or a purchaser. In either case, the rights of the parties, so far

as they are conflicting, are to be governed by the principles decided in the case of *Lanfear v. Sumner*, 17 Mass. 110 [9 Am. Dec. 119], that where different persons claim the same goods by conveyances equally valid, he who first lawfully acquires the possession, has the better title. And this fact the jury have found in favor of the plaintiffs.

But it is insisted that there is no evidence of delivery to the plaintiffs, or of possession taken by them, and that the judge was not legally warranted in leaving it to the jury to infer such a fact from the evidence, if satisfied that it existed. The evidence was, that as many thousands of the shingles as were sold to the plaintiffs, were marked with the initial of the surname of one of them, and that they claimed such as were thus marked as their property. This coupled with their bill of sale, must, we think, be regarded as evidence of a delivery to them, proper to be left to the jury. There was ample time for such designation and delivery between October, when their bill of sale is dated, and the following May, when Chase took possession. In *Melvin v. Whiting*, 13 Pick. 184, it was holden to be altogether uncertain whether the initials engraved in the rock, were indicative of a claim to the soil or to the fishery; but in this case the mark clearly indicated a claim to the shingles. It was evidence, that those thus marked were set apart from the rest, and belonged to him, whose mark was affixed.

The jury having found, that the plaintiffs had the first delivery, their title is good, aside from any assignment of Perry's permit to them. He had an undoubted right to sell the shingles when made. Ramsdell, of whom he purchased the timber, does not interpose, if he had any right to do so. The assignment of the permit being immaterial, we can not sustain the exceptions taken to the instructions of the judge upon that part of the case, if their correctness was questionable, in regard to which it is unnecessary to give an opinion. From the evidence it would seem, that if judgment is rendered on the verdict, Chase's title to the entire quantity mentioned in his bill of sale, will remain unaffected, having received an excess equal in value to what the plaintiffs have recovered.

Exceptions overruled.

CONDITIONAL SALE OF CHATTEL: See *Lane v. Borland*, ante, 33.

DELIVERY, WHAT SUFFICIENT TO PASS TITLE TO CHATTELS: See *Jewett v. Warren*, 7 Am. Dec. 74; *Buffington v. Curtis*, 8 Id. 115; *Pleasant v. Pendleton*, 18 Id. 726; *Shumway v. Rutter*, 19 Id. 340; *Woodbury v. Long*, Id. 345; *Tuxworth v. Moore*, 20 Id. 479; *Moore v. Kelley*, 26 Id. 283; *Cobb v. Haskell*, post.

PURCHASER FIRST ACQUIRING POSSESSION GETS TITLE.—When the same chattel is sold to two purchasers by conveyances equally valid, the one first lawfully gaining possession takes the title: *Lamb v. Durant*, 7 Am. Dec. 31 and note; *Lanfear v. Sumner*, 9 Id. 119 and note; *Fletcher v. Howard*, 16 Id. 686.

ERRONEOUS INSTRUCTIONS WHICH ARE IRRELEVANT are no ground for reversing a judgment where the law as to the matters in issue was correctly stated: *Cassell v. Cooke*, 11 Am. Dec. 610. In *Ellis v. Short*, 21 Pick. 145, the principal case is referred to with disapproval, as holding that improper rulings on immaterial points are not a ground of reversal where substantial justice has been done, for the reason that, as the court say, this doctrine trenches upon the province of the jury.

WOODBURY v. BOWMAN.

[14 MAINE, 184.]

INSOLVENT DEBTOR HAS A LEGAL RIGHT to give a preference to one creditor over another.

MONEY, NOTES, ETC., LEFT WITH A THIRD PERSON by an insolvent debtor, contemplating suicide, with a letter inside the bundle directed to one of his creditors, stating that they are to be appropriated to payment of his claims, and that if anything is left it is to go to the debtor's children, if delivered to the creditor by the person with whom they are left after the debtor's death, may be retained by such creditor as against the other creditors so far as necessary to satisfy his claims.

TRUST CREATED FOR THE BENEFIT OF A THIRD PERSON, without his knowledge at the time, may be afterwards affirmed and enforced by him.

AGREED case. The question was as to the right to certain notes, money, bank-bills, etc. The plaintiffs claimed as administrators of one Winter. The defendant was one of Winter's creditors, having incurred large liabilities for him by indorsement and otherwise, which he had been compelled to pay. The property in question was left by Winter, tied up in a handkerchief, in a room occupied by him for the time being, in the house of one Miss Robb. He made no communication to Miss Robb in regard to it before his disappearance, nor was there any direction on the outside of the bundle as to what was to be done with it. It was supposed to have been left by mistake until the discovery of certain circumstances leading to the belief that Winter had committed suicide. The bundle was then opened by the defendant and Miss Robb, and was found to contain a package in which was the property in question, with a letter tied on the outside of the package directed to the defendant in Winter's handwriting, the contents of which were as follows: "Keep the contents of this to yourself—'tis to relieve you from your liabilities for me. If anything is left let my children have

it." Signed by Winter. The defendant had received payment of some of the notes, which had on them an indorsement to the defendant's order signed by Winter. A few days after the opening of the package it was ascertained that Winter had in fact committed suicide. He died insolvent. If upon these facts the defendant was entitled to retain said notes, etc., so far as necessary to indemnify him for his liabilities for Winter, an account was to be taken, and if there should be no surplus the plaintiffs should be nonsuited. If the defendant was not so entitled, he should be defaulted, and judgment given against him for the amount in his hands.

Daveis, for the plaintiffs.

Mellen and Randall, for the defendant.

By Court, *WASTON*, C. J. Winter, although an insolvent man, had a legal right to give a preference to one creditor over another. In pursuance of this right, he indorsed certain negotiable instruments to the defendant. These, together with a bank check and certain bank notes, which, being payable to bearer, pass by delivery, he inclosed in a package, upon which there was fastened a letter directed to the defendant, advising him, that they were intended for security against certain liabilities, which he had assumed on his account. Thus far the transaction, if consummated, could not have been impeached by other creditors. But there was another direction to pay over the surplus, if there was any, to his children, which his creditors may defeat. The defendant however was in no degree privy to this unlawful appropriation, and he expressly disclaims and repudiates this part of the arrangement. If the part, which was for his benefit, can surmount other objections, which have been interposed, we are of opinion, that he ought not to be prejudiced by the attempt of the deceased to create a trust for the benefit of his children.

It is contended, that Winter had a power of revocation, up to the period of his decease. No such power was reserved by him in the written evidence of the transaction, nor is there reason to infer that a revocation was at all within his contemplation. Before the desperate purpose, which he meditated, was carried into effect, it might fairly have been insisted, that it was possible he might have been diverted from it, either by the sounder suggestions of his own mind, or from adventitious causes; and that if this had been the result, he had the power, and would probably have exercised it, to have withdrawn the

appropriation he had made for the defendant. Whether this can now be said to have been possible, is a metaphysical question, which we do not consider ourselves called upon to decide. The firmness of his resolve has been so fully demonstrated, that we regard it as a just inference, that the transaction was not only absolute and unqualified in form, but was intended to be so in fact, no possible or contingent revocation being contemplated.

A question of a graver character is, whether the arrangement was not arrested and defeated by the death of Winter. And it can not but be admitted, that it is one of no small difficulty. It must, however, be decided; although the preponderance in favor of the prevailing party may be less strongly marked, than could have been desired. The determination of Winter to give a preference warranted by law to the defendant, has been clearly manifested. When he left Miss Robb's house, he intentionally parted with the actual possession of the bundle he had made up, never to be resumed. Had he called her up and confided it expressly to her care, she would have found that it contained a package, which she was to receive in trust for the defendant. Did he not do the same thing by acts, not to be misunderstood? He left the bundle in Miss Robb's house, in her possession, on her sofa. What was to be done with the package, was not communicated to her orally, but it was by the written direction upon it. Is it too much to say, that it was left with Miss Robb in trust, to be delivered according to its destination? It was not the less confided to her care, because she remained for some time ignorant of the deposit, or of its contents.

To give effect to a transaction lawful in itself, and free from any fraud imputable to the defendant, we do not regard it as too much to hold, that when Winter left the house he parted with the possession of the contents of the package, in regard to which he had made a written declaration of trust, for a lawful purpose, in favor of the defendant, and that Miss Robb became thereupon actually, or at least constructively, the trustee and depository, through whose intervention the trust was to take effect; as we think the postmaster at Bath would have been, if Winter had put the package into his letter-box; although it might not have come to his knowledge until life had been extinguished in Winter: *McKenney v. Rhodes*,¹ 5 Watts, 343.

Much of the argument has turned upon the peculiar doctrine

1. *McKinney v. Rhodes*.

of donations, *inter vivos*, and *causa mortis*, to which, in our judgment, the case bears no just resemblance.

The counsel for the defendant places his claim to the property sought to be recovered in this action, upon the ground of a contract or transfer, and that there was a delivery to Miss Robb, or to some one in her house, which would inure to the defendant's benefit. And cases have been cited, where deeds delivered as escrows, or upon condition, where the condition has been performed after the death of the grantor, have been held to take effect from the first delivery, to uphold and sustain what had been done. In these and other similar cases, although the concurrence of both parties may have been essential to their validity, the requisite act or concurrence of the grantee, even after the decease of the grantor, has been deemed sufficient. In *Bowers v. Hurd*, *Adm'r*, 10 Mass. 427, the plaintiff had a strong moral, although not strictly legal, claim upon the defendant's intestate, to satisfy which, the latter made a note of hand to the plaintiff, but without her privity or knowledge, until after the decease of the intestate, and deposited it with a third person. This was held to be good, upon the subsequent assent of the plaintiff. Whether or not, upon the authority and analogies deducible from the cases cited for the defendant, he is entitled to hold the property upon the ground of a contract; he may be so entitled, upon the trust expressly declared in his favor. It is a well-settled doctrine in equity, that where a trust is created for the benefit of a third person, without his knowledge at the time, he may afterwards affirm it, and enforce its performance: *Neilson v. Blight*, 1 Johns. Cas. 205; *Moses v. Murgatroyd*, 1 Johns. Ch. 119 [7 Am. Dec. 478]; *Duke of Cumberland v. Codrington*, 3 Id. 261 [8 Am. Dec. 492]; *Shepherd v. McEvers*, 4 Id. 136 [8 Am. Dec. 561]. How then does the case stand? Winter, in his life-time, by writing under his hand, sets apart the property in question, and declares it appropriated for the indemnity of the defendant. He deposits it with Miss Robb, that it may be disposed of as directed, and then takes his own life. As soon as the fact comes to the knowledge of the defendant, he affirms the trust, and receives the property to be held for his indemnity, with the assent of the trustee and depository.

We are not aware, that the circumstance of the business having been done by Winter in the near, or even certain approach of death, calls for a different construction. It has never been decided, that a man may not prefer one creditor to another,

so long as he is competent to transact business, or that an act done for this purpose, by one who is conscious that his end is near, may be avoided as a fraud upon the laws for the distribution and settlement of insolvent estates. No case has come to our knowledge, in which the payment or security of an honest debt, has been attempted to be defeated upon this ground. If a preference under such circumstances is lawful, the intervention of death as a matter of certainty, or even of calculation, can make no difference. If an insolvent man, apparently in full health, and in the reasonable expectation of the continuance of life, deposits with a third person a sum in bank notes, or in bills of exchange or notes of hand indorsed by him, with written directions that they be delivered as security to a creditor, to whom he owes about an equal amount, and then happens to die, either from accident or disease, and the preferred creditor subsequently claims the deposit, we are aware of no legal reason why he may not receive it, for the purpose for which it was appropriated. It is not necessary in such case, as we have seen, that the act of the one, and the assent and concurrence of the other, should be simultaneous. A deed of mortgage to secure a creditor, thus delivered, although accepted after the death of the mortgagor, it is clear from the authorities, would take effect.

The counsel for the plaintiffs has cited a class of cases where an assignment is made by a debtor to third persons, for the benefit of his creditors, upon certain terms prescribed. This has been held not to be effectual against the attachment of creditors so as to bind the property, except in favor of those who have assented; and this principally upon the ground that a debtor shall not be permitted, by conveying to others, to put his property out of the immediate reach of his creditors, without their consent. A conveyance or mortgage directly to a creditor as payment or security is not liable to this objection. Even in an assignment to third persons it has been strongly intimated by more than one judge, that the consent of preferred creditors may be presumed, although the law is not so understood in this state or in Massachusetts. In the conveyance of real estate, the consent of the grantee is presumed until he expresses his dissent or refusal. And it would seem, if there ever was a case where the consent of a creditor might be presumed, it is where his debtor deposits a sum of money and available notes of hand indorsed to him, and intended directly for his security.

If a man unable to pay all his debts, upon the eve of dissolution, and conscious of the fact, but yet capable of transacting business, delivers a deed conveying land to one of his creditors in payment of his debt, to some one about him bed, it is good, although accepted after his decease. If he delivers his watch to a third person to be handed to a creditor for the same purpose, shall it not be equally effectual? Is there less difficulty in the transfer of real than of personal estate? But it is contended that death prevented the transit; that the insolvent laws operated as an appropriation of all the property of the deceased for the use of all his creditors, and that the transfer in this case was not consummated. The argument, sustained as it is by the equitable policy of the insolvent laws, is certainly entitled to great consideration, and we have felt its force. But it must be remembered that the insolvent laws take effect upon the death of the insolvent. While living, to the last moment, he has a right to dispose of his property, to pay or secure his debts. The deceased made a specific appropriation of a portion of his property, to secure the defendant, declaring in writing, that it was to be for this purpose, and left it with a third person for his use; and upon the whole, we are of opinion, if the assent of the defendant is not to be presumed, that his subsequent affirmance does, by relation, give effect to the appropriation in the life-time of the deceased; so that the defendant may lawfully hold against the plaintiffs so much of the property as is necessary for his indemnity.

INSOLVENT DEBTOR'S RIGHT TO PREFER CREDITORS: See, for a discussion of this subject, the note to *Crawford v. Taylor*, 26 Am. Dec. 584. See also the note to *Dulaney v. Hoffman*, 28 Id. 219, referring to other cases in the American Decisions on the same point.

TRUST CREATED IN FAVOR OF THIRD PERSON WITHOUT HIS KNOWLEDGE may be affirmed and enforced by him: *Moses v. Murgatroyd*, 7 Am. Dec. 478 and note; *Shepherd v. McEvers*, 8 Id. 561; *Rodney v. Shankland*, 12 Id. 70 and note; *New London Bank v. Lee*, 27 Id. 713.

NEWHALL v. DUNLAP.

[14 MAINE, 180.]

AGENT DRAWING A BILL IN HIS OWN NAME, without stating that he acts as agent, is personally liable thereon, notwithstanding a request to charge to a particular account, and although the payee knows him to be an agent, except where he contracts in behalf of the government.

CHARACTER IN WHICH AN AGENT ACTS IN DRAWING A BILL MAY BE SHOWN as between himself and his principal, though he may be personally liable to third persons.

MASTER OF A VESSEL HAS NO POWER OF BUYING and selling, incident to his office as master, and where he is authorized by a letter of instructions from the owner to draw bills for the purpose of making purchases for such owner, he acts as agent or factor, and not as master, in drawing such bills.

MASTER OF A VESSEL HAS A LIEN upon property purchased by him with the proceeds of a bill drawn under a letter of instructions from the owner, upon which he is personally liable by reason of its being drawn in his own name, though directed to be charged to the cargo of his vessel, and this lien is not divested by the owner's death.

THOUGH THE MASTER OF A VESSEL DEPARTS FROM THE STRICT LETTER of his instructions in drawing a bill for purchases for a shorter date than he is authorized, if the owner or his administrator claim the proceeds he can not deny the agency.

PRINCIPAL CAN NOT MAINTAIN REPLEVIN AGAINST AN AGENT for goods upon which the latter has a lien, without discharging such lien.

REPLEVIN for certain goods, claimed by the plaintiffs as administrators of one Winter. The goods were purchased by one Goodrich, under whom the defendants claim, the said Goodrich being master of a vessel owned by Winter, and, in payment for said goods, having drawn a bill upon the said Winter in his own name, but directing the amount to be charged to the cargo of the vessel. Other facts appear from the opinion. Verdict for the defendants, to be set aside or amended, according to the opinion of the court upon the facts. ♦

Daveis and Adams, for the plaintiffs.

Deblois, for the defendants.

By Court, SHEPLEY, J. The claim of the defendant, Goodrich, to detain the property replevied must depend upon the character in which he acted, the responsibilities incurred, and the rights arising out of them. He was master of the vessel of the intestate, with a letter of instructions, giving him authority to draw a bill of exchange, and to make purchases for his principal. If he has not incurred any personal responsibility, he can not detain the property. The bill was drawn by Goodrich without any statement or exhibition of agency, unless it may be inferred from the request to charge it to the account of the Hope's cargo. Such request affords no distinct indication of an agency. It only indicates the fund to which it was to be charged, not the character in which the drawer signed. The general rule, as stated by Chitty, is, if a person draw in his own name, without stating that he acts as agent, he will be personally liable, unless in the case of an agent contracting in behalf of government: Chit. on Bills, 40. It is said, in Bay-

ley on Bills, 68, that an agent should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to show that intention. And he clearly does not consider a request to charge to a particular account, as affording any evidence of an agency; for he says, "if an agent for A. draw upon B. in favor of C. though he direct B. to place the amount to the account of A.'s debit, he will be personally liable to C. if the bill be not paid, unless he use proper words to prevent such liability.

Lord Ellenborough says, not only that such is the general rule, but that "unless he says plainly, 'I am the mere scribe,' he becomes liable." And he does not consider the knowledge of the party taking the bill as making a difference. He says, "though the plaintiff knew the defendant to be agent of the Durham bank, he might not know but that he meant to offer his own responsibility:" *Leadbitter v. Farrow*, 5 Mau. & Sol. 345. It is a well-settled rule: Paley on Agency, 298; 5 Taur. 749;¹ 7 Id. 159;² 5 Mason, 241;³ 11 Mass. 27,⁴ 54;⁵ 2 Greenl. 204.⁶ And Goodrich must be regarded as liable upon the bill. It must have been drawn in the character of master, or as agent or factor; and this may be shown as between him and his principal, although he may be personally responsible to third persons.

In England the master of a vessel has no lien on the ship, freight, or cargo for money expended or debts necessarily incurred: *Hasey v. Christie*, 9 East, 426;⁷ *Smith v. Plummer*, 1 Barn. & Adol. 575.⁸

In Massachusetts, the master is allowed to have a lien in such cases: 4 Mass. 91;⁹ 11 Id. 72.¹⁰ So is he in New York: *Ingersoll v. Van Bokkelen*, 7 Cow. 670. Kent observes, that the American cases have taken the most reasonable side of the question: 3 Com. 167, note b.

The transaction now under consideration can not, however, be regarded as falling within the scope of his authority as master. In the ordinary state of things, says Lord Stowell, he is a stranger to the cargo beyond the purposes of safe custody and conveyance; yet in cases of instant and unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him: *The Gratitude*, 3 Rob. Ad. 240. The case of *Watt v.*

1. *Le Fevre v. Lloyd*.

2. *Goupy v. Hardy*.

3. *Lumber v. Shaw*.

4. *Stackpole v. Arnold*; 8 C., 6 Am. Dec. 150.

5. *Mayhew v. Prince*.

6. *Scott v. McLellan*.

7. *Hussey v. Christie*.

8. 1 Barn. & Ald.

9. *Lane v. Penniman*.

10. *Lewis v. Hancock*.

Potter, 2 Mason, 77, is to the same effect. The power of purchasing and selling has been regarded by this court as not coming within the power usually incident to the office of master: 3 Greenl. 298.¹ The cases of *Kemp v. Clough*,² 11 Johns. 107, and *Emery v. Hersey*, 4 Greenl. 407 [16 Am. Dec. 268], are not regarded as at variance with the other cases, as in them a customary course of business was proved, extending the powers and duties of the master beyond their ordinary limits, and the cases were decided upon that ground. It was no doubt competent to the owner in this case to enlarge the powers of the person employed as master, and to clothe him with authority to draw bills and to purchase a cargo. But such authority is not derived from his office of master, but from the letter of instructions, constituting him his agent for those purposes. And in the character of agent he must be regarded as acting in drawing the bill and making the purchases. It becomes material then to inquire, what rights he acquired by law over the property purchased by him, as agent, with the proceeds of the bill upon which he is personally liable.

It is stated in Paley on Agency, 109, that the general lien of a factor, first received the sanction of legal authority, in the case of *Kruger v. Wilcox*, Amb. 252, and that it has never been controverted since. And such is the settled law, as well in this country as in England. *Godin v. London Ass. Co.*, 1 Burr. 494; *Drinkwater v. Goodwin*, 1 Cawp. 251; *Houghton et al. v. Matthews et al.*, 3 Bos. & Pul. 489; *Burrill v. Phillips*, 1 Gall. 360; *Stevens v. Robbins*, 12 Mass. 180. The cases of *Drinkwater v. Goodwin* and *Stevens v. Robbins* show that one who is liable to pay, has the same lien as if he had paid. Nor does the death of the principal deprive the agent of his lien: *Hammonds v. Barclay*, 2 East, 227. But it is said, the agent did not follow his instructions in drawing the bill, and that he can not create a lien by his own wrong. The agent having departed from the strict letter of his instructions in making the bill payable at a shorter date, than authorized, it might have been in the power of the plaintiffs to have disclaimed the whole transaction. But they can not claim the property, and yet deny the agency of Goodrich in the purchase of it. They have claimed the property purchased by the proceeds of the bill, and it is now too late to deny the agency. Goodrich being entitled to a general lien upon the goods in his possession, to secure him for his liabilities, the plaintiffs can not maintain replevin, until

1. *Descodillas v. Harris*.2. *Kemp v. Clough*.

that lien is discharged. The facts upon which this decision is made, are proved by testimony not liable to objection; and it has not been considered necessary to decide the other points made at the argument.

There must be judgment on the verdict, and for a return of the goods; but the defendant can not claim to hold them for more than the payment of the claim of Goodrich, arising out of his liability on the bill, and for all necessary subsequent expenses upon them. It will be useless to claim damages on the replevin bond, if the goods are themselves sufficient to satisfy these claims, as the defendants will hold in trust for the plaintiffs whatever comes to their hands more than sufficient for these purposes.

AGENT PERSONALLY LIABLE ON BILL or note or other contract signed by him, when: See *Rossiter v. Rossiter*, 24 Am. Dec. 62; *Pentz v. Stanton*, 25 Id. 558; *Andrews v. Estes*, 26 Id. 521; *Collins v. Allen*, 27 Id. 130, and the notes thereto referring to other cases in this series on the same subject. The doctrine of the principal case on this point is approved in *Williams v. Robbins*, 16 Gray, 81.

MASTER'S LIEN ON CARGO FOR FREIGHT AND CHARGES: See *Everett v. Coffin*, 22 Am. Dec. 551 and note.

WATSON v. PROPRIETORS OF LISBON BRIDGE.

[14 MAINE, 201.]

BRIDGE CORPORATION IS LIABLE FOR AN INJURY occasioned to the horse of a passenger over such bridge by defects in the way leading thereto from the public highway which it has adopted as part of such bridge, where it is required by the statute under which it is incorporated to keep the bridge in repair.

EVIDENCE OF WHAT A DECEASED WITNESS SWORE on a former trial of the same cause is admissible.

FACT THAT MEMBERS OF A BRIDGE CORPORATION WORKED ON THE ROAD leading to the bridge from a public highway, is no evidence of the adoption of such road by the corporation as part of the bridge.

ADMISSION OF IMMATERIAL TESTIMONY is no ground for a new trial.

MEMBERS OF A BRIDGE CORPORATION ARE NOT COMPETENT WITNESSES for the corporation in an action against it for an injury caused by defects in the bridge.

MEASURE OF DAMAGES FOR THE LOSS OF A HORSE whose death was caused by a defect in the defendant's bridge, in such a case, includes not merely the value of the horse, but moneys prudently expended in attempting to cure him.

ACTION ON THE CASE FOR AN INJURY TO THE PLAINTIFF'S HORSE CAUSED BY DEFECTS IN THE DEFENDANTS' BRIDGE, FROM THE EFFECTS OF WHICH

the horse subsequently died. It appeared that the accident arose from defects in a passage way about twenty rods long leading to the public highway from the bridge, and which was the only means of approach to the bridge from the highway. The corporation defendant had adopted this way as a passage to their bridge, and had repaired it, though it was constructed by certain private individuals. The plaintiff at the time of the accident was riding over this way to get on the bridge, and after the injury passed over the bridge and paid toll thereon. He expended some money in attempting to cure the horse of the injury, but in spite of his endeavors the animal died. The defendants moved for a nonsuit, because the injury was occasioned by defects in a passage way leading to the bridge, and not in the bridge itself. Verdict for the plaintiff, which the defendants now moved to set aside. The questions arising in the case sufficiently appear from the opinion.

Codman and H. Belcher, for the defendants.

Mitchell, for the plaintiff.

By Court, WESTON, C. J. The statute, by which the defendants were created a corporation, and authorized to build the bridge in question, and from which also they derive their right to claim and receive toll, imposes upon them the duty to keep the same "in good, safe, and passable repair." If the plaintiff has sustained an injury, from the failure of the defendants to fulfill this duty, we doubt not he may sustain an action therefor. This results from the principles of natural justice, which are to be applied as well to corporations as to individuals. The case of *Riddle v. Proprietors of Locks and Canals on Merrimack River*, 7 Mass. 169 [5 Am. Dec. 35], is an authority in point, to which we refer.

The declaration sets forth the liability of the defendants to keep the bridge in safe and convenient repair, for the accommodation of all the citizens "paying a reasonable and stated toll therefor," and avers "the readiness of the plaintiff to pay said toll, when he arrived at the toll-house." But we are not called upon, in the case before us, to decide upon the sufficiency of the declaration, which is not drawn in question, either upon demurrer, or upon a motion in arrest of judgment. Nor is the title of the defendants to the land, upon or over which their bridge passes, properly in controversy. Whatever it may be, or whether it commenced or is continued by right or by wrong, the measure of their liability is the same. We doubt not it was

competent for the plaintiff to prove what a deceased witness had testified to at a former trial of this cause. It is liable to no legal objection; and is well sustained by authority, and the practice of our courts.

The plaintiff was permitted to prove, that members of the corporation had worked upon that part of the passage way, where the injury happened. It is quite immaterial by whom this was done, or whether there was or was not a proper deduction of authority from the corporation. If it was adopted by them, and it does in fact form a part of the bridge, it was the duty of the defendants to keep it in repair. That it was adopted as a part of the bridge, is in no degree deducible from the fact that it was worked upon by some of the members of the corporation. That evidence, then, we regard as immaterial, and therefore its admission does not, in our judgment, constitute a sufficient objection to the verdict. The members of the corporation, offered as witnesses for the defendants, had a direct interest in the event of the suit. This does not belong to the class of corporations, the members of which are made competent witnesses by statute.

The main question is, whether from the facts, the place of the injury constituted a part of the bridge. And we are of opinion that it did. It was on or near ground, which had been wharfed up, where that end of the bridge landed. It was properly the entrance to the bridge, from the public traveled way; and the only way of ingress and egress, of which travelers passing the bridge could avail themselves. If an access like this might be left in a dangerous state, without liability on the part of the defendants, the bridge, for the passing of which they receive compensation, would become a trap, instead of an accommodation, for travelers. It is too narrow a construction to hold, that a bridge over a river ceases at the point where it rests upon the land, and that those who are charged with the duty of making it passable, are not bound to make it accessible from the bank on either side, or having done so, that they are not bound to keep it safe and convenient.

The liability of the defendants being established, the only remaining question is, as to the measure of damages. The plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood, that it was an expense prudently incurred, in the reasonable expectation that it would

prove beneficial. It was incurred, not to aggravate, but to lessen, the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss.

Judgment on the verdict.

DEFECTS IN HIGHWAYS AND BRIDGES, LIABILITY FOR: See *Reed v. Northfield*, 23 Am. Dec. 662 and note; *Randall v. Proprietors*, 25 Id. 453 and note.

EVIDENCE OF WHAT DECEASED OR ABSENT WITNESS SWORE ON FORMER TRIAL, ADMISSIBLE, WHEN: See the note to *Magill v. Kauffman*, 8 Am. Dec. 717; *Drayton v. Wells*, 9 Id. 718; *State v. DeWitt*, 27 Id. 371; *Crary v. Sprague*, Id. 110 and note, and *Commonwealth v. Richards*, 29 Id. 608 and note.

MEMBERS OF CORPORATION, COMPETENCY OF, AS WITNESSES FOR THE CORPORATION: See *Lynch v. Postlethwaite*, 12 Am. Dec. 495; *Miller v. Mariner's Church*, 20 Id. 341; *Congregational Soc. v. Perry*, 25 Id. 455.

ADMISSION OF UNNECESSARY EVIDENCE is not a ground for a new trial where the verdict is supported by other evidence: *Landon v. Humphrey*, 23 Am. Dec. 333. See, also, *Stone v. Stevens*, 30 Id. 611 and note. The doctrine of the principal case on this point is disapproved in *Ellis v. Short*, 21 Pick. 145.

STATE v. FIELD.

[14 MAINE, 244.]

EVIDENCE OF DECEASED'S VIOLENT CHARACTER ON INDIOTMENT FOR MANSLAUGHTER.—Evidence is inadmissible in favor of one on trial for manslaughter, that the deceased was addicted to drink, and was a quarrelsome and dangerous man when under the influence of liquor, although it appears that he had been drinking on the day of the killing, where there is no evidence of provocation or excuse for the killing.

INDIOTMENT for manslaughter for the killing of one Nathaniel Field. It appeared that the defendant and the deceased had both been drinking on the day of the homicide and had had a violent quarrel; that they both occupied the same house, and that the deceased, who was the stronger man, on entering a certain room, which both had an equal right to occupy, was immediately struck with an ax by the defendant and killed. The judge on the trial excluded certain evidence offered by the defendant, the nature of which appears from the testimony. After a verdict of guilty the defendant brought the case here on exceptions to the rejection of said evidence.

W. P. Fessenden, for the defendant.

Clifford, attorney-general, for the state.

By Court, EMERY, J. The defendant, on an indictment for manslaughter, for killing Nathaniel Field, on the twenty-second December, 1835, has, by the verdict of a jury, been found guilty. In the course of the trial, evidence was proposed to be offered, that the deceased was a man in the habit of drinking to excess whenever he could get rum, and that drinking spirit of any kind uniformly had an effect to make him exceedingly quarrelsome, savage, and dangerous; that he had when in liquor frequently threatened the life of his wife and others; and that the prisoner had, more than once, been called upon to protect his wife and family from his drunken fury; and that his habits and character were well known and understood by all about him. The judge refused to admit the evidence, and ruled that no evidence of his drinking, or habits, could be received at any other time than on the day aforesaid.

The argument of the defendant's counsel is, that if the defendant had good reason to believe, that Nathaniel, the deceased, intended to kill him, and that he burst open the door with that intent, that the evidence of the savage and dangerous character of Nathaniel, when in liquor, and his habits of drinking ardent spirits, should have been admitted to relieve the defendant from the imputation of guilt, because it would be inferred that he acted promptly to preserve his own life; that his motive was justifiable. A case in 5 Yerger, 459,¹ and the cases of *United States v. Willberger*, 3 Wash. C. C. 515, and *Selfridge's case*, are cited in support of the positions assumed by the counsel for the defendant.

Willberger's case was finally decided in the supreme court of the United States, on a question of jurisdiction, in favor of the prisoner, notwithstanding the verdict against him in the circuit court: 5 Wheat. 76. But to the law, as stated to the jury by Judge Washington, upon the branch of the case, in any degree applicable to the present topic, we cordially assent. "A man may oppose force to force in defense of his person, his family, or property, against one, who manifestly endeavors by surprise or violence to commit a felony, as murder, robbery, or the like. But to justify killing the aggressor, his apparent intent must be to commit a felony. That apparent intent is to be collected from the attending circumstances, the manner of the assault, the nature of the weapon used, and the like; and it must appear that the danger was imminent, and the species of resistance used, necessary to avert it." Of the benefit of all

1. *Granger v. State*; S. C., 26 Am. Dec. 278.

these attending circumstances, the defendant, Field, availed himself on the trial, through the faithfulness and ability of his counsel.

The trial of Selfridge took place in 1806. That of the *United States v. Willberger*, in 1819. And perhaps it would be doing no injustice to the high desert of the learned Judge Washington, who presided in the latter trial, to imagine that he might have had the benefit of the lucid charge of the late Chief Justice Parsons to the grand jury, so far as it is made known, in the commencement of the report of Selfridge's trial, as well as of the interlocutory decision, so to speak, of Judge Parker, and his charge on summing up to the jury of trials. The coincidence of expression is striking. Parsons, C. J., had charged the grand jury, that a bare fear, however well grounded, unaccompanied by any open act indicative of such an intention, will not warrant him in killing.

Austin, the young man slain, was the son of a gentleman, against whom the defendant, Selfridge, had published in a newspaper a libel on the morning of the conflict. The deceased was standing with a hickory cane in his hand near the corner of Suffolk buildings, in Boston. Having cast his eyes upon Selfridge, who was coming down, crossing State street diagonally toward the United States Bank, his hands behind him, outside of his coat, without anything in them, Austin shifted his cane into his right hand, stepped quickly from the sidewalk to the pavement, and advanced upon the defendant with his arm uplifted. As the deceased approached, the defendant put his right hand into his pocket and took out his pistol, while his left arm was raised to protect his head from an impending blow. The defendant turned, stepped one foot back, a blow fell upon the head of the defendant, and the pistol was discharged at the deceased at one and the same instant. Several blows were afterward given, and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who, becoming exhausted, fell down, and in a few minutes expired.

The late learned and excellent Judge Parker, alike distinguished for native sagacity, courtesy of manners, benevolence, and intrepidity in discharge of duty, who, previous to his advancement to the station of chief justice, presided at the trial of Selfridge, in charging the jury, doubted whether self-defense could in any case be set up, when the killing happened in consequence of an assault only, unless the assault be made with a

weapon which, if used at all, would probably produce death. The stress of the case, in the judge's mind, was for the jury to settle whether the defendant could probably have saved himself from death, or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him.

The case probably is cited more particularly to show, that the ruling excepted against was too circumscribed, because in *Selfridge's case* an examination was had to see whether the assault was by the procurement of the defendant, when the whole story of the misunderstanding between the defendant and the deceased's father was heard by the jury. But the judge declared, in his charge to the jury, that he thought it was going too far back to have an influence on the trial, but which the urgency of the attorney-general, and the consent of the defendant's counsel, finally induced the judge to admit. On the motion to admit the evidence, he observed that his own opinion was, that nothing was proper evidence excepting what took place on the same day, or very shortly before; and more particularly, that anything which went to show a previous quarrel with another person, or even with the same person, was not proper, the law being clear that no provocation by words would justify blows.

So far, then, as we apprehend the law on this subject, we perceive nothing in two of the cases cited by the defendant's counsel, militating with the ruling of the judge, in the case at bar. The case cited from Yerger's reports, we have not been so happy as to see. We regret it the more, because of the high reputation of the court and of the reporter. We must be contented to take the law as we find it this side of the Alleghanies.

It would not be allowable to show on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offense, as that charged against him: 1 Ph. Ev. 143. Although the deceased may have been a savage and quarrelsome man, when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. We look in vain among the attending circumstance of the melancholy catastrophe, for a provocation, or an excuse, for the resort to the deadly weapon, which the defendant used to destroy the life of his victim. And to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime of

which the defendant stood charged, to justifiable or excusable homicide.

The permission given to the defendant, as to evidence of what transpired that day, was as liberal as the principles of the administration of criminal justice would authorize the court to grant.

The exceptions are overruled.

MANSLAUGHTER, WHAT CONSTITUTES: See *State v. Ferguson*, 27 Am. Dec. 412, and other cases in this series referred to in the note thereto. A homicide committed by one in danger of great bodily harm, or who believes himself so, is held, in *Grainger v. State*, 26 Id. 278; S. C., 5 Yerg. 459, to be justifiable, and if committed to prevent a battery less violent, it is manslaughter, and not murder. Thus, where such homicide is committed by a timid, cowardly man in imminent danger of a violent and instant assault and battery, and cut off from the chances of probable assistance, it is manslaughter, not murder: Id. See also the note to that case. As to the admissibility of evidence of the character of the deceased for violence upon an indictment for manslaughter, see *State v. Wells*, 1 Id. 211.

COBB v. HASKELL.

[14 MAINE, 303.]

DELIVERY OF BOARDS UNDER A BILL OF SALE, to secure a prior debt, is not sufficient to pass title against a subsequently attaching creditor, where the boards are lying in different piles about a mill-yard, and the vendor, going in sight of them, points towards them and says, "There is the lumber," and tells the vendee to take it away and make the best of it, and the vendee goes away and leaves the lumber as it is, and exercises no ownership over it for two months, and until the attachment is levied.

TRESPASS, in the common pleas, for certain pine boards. The plaintiff claimed under a bill of sale from one Haley, and the defendant was the servant of a deputy sheriff, who had attached the property for a debt of Haley. The question was, whether there was a sufficient delivery to pass the property to the plaintiff. It appeared that the plaintiff, being a creditor of Haley, applied to him for security, when the latter made a bill of sale of the boards to him; that they were lying, at the time, in different piles about a lumber-yard; that after the conveyance was executed, Haley went with the plaintiff to the door of his store, in sight of the yard, and pointing towards the yard, said, "There is the lumber I billed to you;" that it was marked with the letter H, and that he wished the plaintiff to take it away and do as he pleased with it, and to appropriate it to the payment of his debt. Haley did not go with the plaintiff to any of the piles,

and there was no survey or account of the quantity taken at the time. The plaintiff did not exercise any act of ownership over the boards, but left them as they were until the attachment was levied, two months afterwards, although he requested a witness "to keep his eye on them, and see how Haley got along;" but did not leave them particularly in his charge. The judge ruled that the delivery was not sufficient, and there was a verdict for the defendant. The case was brought here on exceptions to this ruling.

W. P. Fessenden, for the plaintiff.

Codman, for the defendant.

By Court, WESTON, C. J. By a series of decisions, cited for the defendant, a delivery from Haley, the debtor, to the plaintiff, was necessary to give him a title against an attaching creditor. And the argument for the plaintiff is, that there was a sufficient delivery. The lumber was pointed out to the plaintiff, and he was informed by what mark it might be known. From the testimony it appears, that the plaintiff was requested to take it away, and make the best of it. But the plaintiff took no part of the lumber, nor exercised any act of ownership over it, but left it in the debtor's possession as before, up to the time of the attachment, a period of two months. Considering, however, the nature and position of the property, it comes very nearly up to what has been required, to put it out of the reach of other creditors; but upon the whole, in our judgment, there was not quite enough done to produce this effect; and these transactions are so likely to occasion false credit and fraud upon creditors, that the doctrine of constructive delivery ought not to be extended.

In *Searle et al. v. Keeves*, 2 Esp. 598, when the warehouseman received the order, he became the depositary for the vendee, and there was thus a change of possession. In *Chaplin v. Rogers*, 1 East, 192, the vendee had sold part of the hay, and the second purchaser had actually taken it away. In *Elmore v. Stone*, 1 Taunt. 458, the plaintiff, the vendor of the horses, was a livery-stable keeper, and the defendant had ordered them to be there kept at livery for him. Bayley, J., in *Howe v. Palmer*, 3 Barn. & Ald. 321, says, that case goes as far as any one should, and that the court ought not to go one step beyond it, and that it turned upon the fact, that expense was incurred by direction of the buyer.

In *Hunn v. Bowne*, 2 Cai. 38, one Foley had purchased a

quantity of cotton of one Rodman, and had given his note for it, but left it in Rodman's store. Foley employed Huchinson, a broker, to sell it. Huchinson called on Rodman, desiring to see Foley's cotton. Rodman directed one of his clerks to show it, which he did in a fire-proof store. Huchinson then bought the cotton of Foley, who gave an order for it on Rodman. Before presentment, Foley failed, and Rodman refused to deliver, and sold it to the defendant. The plaintiff having title under Huchinson, prevailed, the jury being of opinion that the defendant purchased, with a full knowledge of these facts. *Lansing v. Turner*, 2 Johns. 16, was a case between the original parties, for a quantity of beef, which had been bought and paid for.

In *Bailey v. Ogden*, 3 Johns. 399 [3 Am. Dec. 509], an agreement with the vendor about the storage of the goods, and the delivery of the export entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indicium* of ownership. In *Rice v. Austin*, 17 Mass. 197, the timber in question was shipped to the plaintiff with an invoice and bill of lading, on his account and risk, and when it arrived, he ordered it to the navy yard in Charlestown. This was held sufficient evidence of possession in him, considering the nature of the property. In *Shumway et al. v. Rutter*, 8 Pick. 443 [19 Am. Dec. 340], there had been a mixed possession, the vendee having taken a part of his purchase for his own use. The strongest case, and that most nearly resembling the one before us, is that of *Jewett v. Warren*, 12 Mass. 300 [7 Am. Dec. 74]. A bill of sale was there made of a quantity of logs. The vendor directed an agent to deliver them to the plaintiff. The agent showed them to him, they being then rafted and lying in a boom. This was held to be a sufficient delivery; the plaintiff doing as others did with similar property, suffering it to remain in the boom until he should have occasion to use it. The boom was a common place of security; which the plaintiff was as much entitled to use as the vendor; and there was all the change of possession of which the property was susceptible.

In the case under consideration, there was not the slightest indication of a transfer of the property. It remained as before in the debtor's mill yard, still bearing the mark it then had, being the initial letter of the debtor's surname. And thus it continued, without a single movement on the part of the plaintiff to avail himself of the property. To sustain his title, under

these circumstances, against an attaching creditor, would be going farther than can be justified by the principles by which cases of this sort have been governed.

Exceptions overruled.

DELIVERY TO PASS TITLE ON SALE OF CHATTELS: See *Jewett v. Lincoln*, ante, 36, and cases cited in the note thereto. In *Burnell v. Robertson*, 5 Gilm. 291, and *Lewis v. Swift*, 54 Ill. 438, the case of *Cobb v. Haskell* is referred to and commented upon, as illustrating the rule that should govern in determining whether there has been a sufficient delivery of a chattel to a purchaser to pass the title as against attaching creditors.

ABBOTT v. HUTCHINS.

[14 MAINE, 390.]

DECLARATIONS OF A SERVANT IN POSSESSION OF CHATTELS attached for his debt that they are his property, are inadmissible against his master, in an action against the attaching officer.

REFLEVIN, for certain clover seed raised on the plaintiff's farm; the defendant, as deputy sheriff, having attached the same for the debt of Moody E. Abbott, while in the possession of the said Moody E. Abbott, on the way to market. Moody E. Abbott was the son and hired man of the plaintiff. The defendant offered in evidence certain declarations of the said Moody E. Abbott, at that time and previously, to the effect that the seed was his property, but the evidence was excluded as hearsay. Moody was present at the trial. After a verdict for the plaintiff, the defendant brought the case here on exceptions to this ruling.

Fessenden and Deblois, for the defendant.

S. Emery, for the plaintiff.

By Court, WESTON, C. J. It appears that the farm upon which the clover seed in question was raised, was in the occupation of the plaintiff; and that she employed Moses E. Abbott, her son, in the capacity of a hired man. Being then the produce of her farm, by the labor of her man, it was clearly her property. If she was guilty of no fraud or collusion, of which not the slightest evidence is reported, her rights ought not to be affected by the acts, much less by the declarations of her hired man.

He was employed in the service of the plaintiff, and had acts to perform, in harvesting the produce of her farm, and in car-

rying it to market. If his declaration, while engaged in this business, that the produce was his, is evidence against her, she may lose it altogether by the claim of a third person, however unauthorized. A clerk in a store, or any other person, having the charge or oversight of another's property, may, upon the same principle, bring the title of the owner into jeopardy, by declaring the property his. And if the assurance with which it is made, and the frequency of its repetition, should at length command belief, the interest of the owner may be defeated, without any fault whatever on his part. Such can not be the law. The rights of a party are not to be affected, either by the acts or declarations of a third person.

There are certain cases, in which the intention of a party giving a character to his acts, may become the object of inquiry, where his declarations made at the time, are received as evidence of that intention. As, for instance, that a bankrupt absented himself from home to avoid his creditors: *Baleman v. Bailey*, 5 T. R. 512. Of the same character may be the declarations of a pauper, as to his motives for passing from one place to another: *Gorham v. Canton*, 5 Greenl. 266 [17 Am. Dec. 231]. So where a party is in possession of land, and a question arises as to the character of that possession, whether he claims it as his own, or holds it in subordination to the title of others, his declarations upon this point are admissible. And this depends upon the peculiar tenure of this species of property, in which a title may commence by disseisin, which by lapse of time may become indefeasible.

But the intentions of Moses E. Abbott, in carrying the plaintiff's clover seed to market, whatever they might have been, or whether avowed or not, had no tendency to impair her title. It was his duty to return the proceeds to his mother, and she would not be the less entitled to it, because it may have been his declared intention to pay his debts, or his taxes, with it, or otherwise to appropriate the money, which might be received for the seed, to his own use. In *Pool v. Bridges*, 4 Pick. 378, the bailee, with whom the plaintiff proved he had deposited a quantity of wool, upon the owner's inquiry, stated what was his, and pointed it out to him, while in the process of being manufactured. It being in the course of business, in respect to property about which there was then no dispute, and against the interest of the party making the declaration, the evidence was received. Here, the declaration offered was an assertion of interest in the declarant.

Had it been originally his property, and the plaintiff had obtained title under a sale from him, his acts and declarations might have been evidence to show the sale collusive: *Bridge v. Eggleston*, 14 Mass. 245 [7 Am. Dec. 209]. But the case before us is of an entirely different character; and in our opinion, the testimony offered by the defendant at the trial, was properly rejected.

Judgment on the verdict.

DECLARATIONS OF AGENT OR SERVANT, WHEN ADMITTED against principal: See *Mather v. Phelps*, 1 Am. Dec. 65; *Babb v. Olmson*, 13 Id. 684; *Burlington v. Calais*, 18 Id. 691; *Welsh v. Carter*, 19 Id. 473; and when not, *Roberts v. Burks*, 12 Id. 325 and note.

HARDING v. SPRINGER.

[14 MAINE, 407.]

UNDER A CONVEYANCE TO HUSBAND AND WIFE, they are not seised of moieties, but of the entirety, and the survivor takes the whole.

MORTGAGOR WITH WARRANTY IS NOT ESTOPPED from subsequently claiming the land as heir of the mortgagee who had a good title at the time of the mortgage; nor is one estopped who claims under a levy of an execution against the mortgagor.

ACTION on a mortgage, brought in the common pleas by the administrator of Azubah Torrey, the mortgagee, against the defendant, claiming under a levy of an execution against Joseph Torrey, the mortgagor. A nonsuit having been directed, the plaintiff excepted and brought the case here. The facts appear from the opinion.

Mitchell, for the demandant.

F. Allen, for the tenant.

By Court, SHEPLEY, J. On the seventh day of March, 1808, Joseph Torrey, and Azubah, his wife, acquired title to the premises demanded, by a deed conveying the same to them and their heirs in fee. Joseph Torrey died about the year 1816, and Azubah, the wife, in 1833.

Husband and wife, being regarded as one person in law, are not in such cases seised of moieties, but of the entirety of the estate; and the survivor takes the whole: *Shaw v. Hearsey*, 5 Mass. 521; 2 Kent Com. 132.

The widow, being sole owner of the estate, on the ninth day of February, 1830, took a deed of mortgage of the same from their son, with covenants of warranty; and this suit is brought

by her administrator, on that mortgage, to recover possession. The defendant claims by virtue of a levy of an execution upon the premises after the estate had descended in part to the same son, as one of her heirs at law. It is quite obvious, that the mother acquired nothing by the deed from her son. But it is said, that the son was estopped by his deed to deny that she did acquire title by it, and that so is the defendant, claiming under him as a privy in estate. And this would be so, if he had mortgaged with warranty to a stranger to the title, and had afterward acquired the title: *Somes v. Skinner*, 3 Pick. 51. The title which he acquired after his deed, was not from a third person, but from the same person to whom he had conveyed. Neither she nor her representative can deny that her own title was good, because she had taken a conveyance from one having no title. The ground upon which the grantee recovers upon his warranty is, that he has lost the land by an elder and better title than that of the grantor, and is therefore entitled to other lands of like value: Co. Lit. 365, a. And if the warrantor has since acquired the title to the lands, his grantee shall hold those lands by way of estoppel, instead of allowing the grantor to recover them from him, and then render to him other lands of equal value: Id. 265, b.

In this case, the grantee, having before a perfect title, could never recover against her grantor other lands, because she could never prove the loss of the title to the land which the deed purported to convey. The foundation, upon which the doctrine of estoppels in such cases is built, fails, and the law of estoppels has no place. The intestate acquired no title by the deed, and her representative can claim nothing by estoppel; and can not, therefore, maintain this suit.

Exceptions overruled, and nonsuit confirmed.

HUSBAND AND WIFE TAKE HOW, UNDER A CONVEYANCE TO BOTH: See the note to *Den v. Hardenberg*, 18 Am. Dec. 377. See also *Doe v. Howland*, Id. 445; *Taul v. Campbell*, 27 Id. 508, and the notes thereto.

ESTOPPEL OF GRANTOR TO CLAIM LAND BY SUBSEQUENTLY ACQUIRED TITLE: See *McPherson v. Cunliff*, 14 Am. Dec. 642; *Taylor v. Shufford*, 15 Id. 512; *Allen v. Sayward*, 17 Id. 221; *Kimball v. Blaisdell*, 22 Id. 476.

LATHROP v. COOK.

[14 MAINE, 414.]

OWNER OF CHATTELS IN POSSESSION CAN NOT MAINTAIN REPLEVIN against an officer wrongfully attaching them as the property of a third person, though he has given a receipt promising to deliver them to the officer on demand, but not admitting property in the attachment debtor.

RECEIPTOR OF PROPERTY ATTACHED while in his possession as the property of another, may show in an action on the receipt that he is the owner, there being no admission to the contrary in the receipt.

REPLEVIN in the common pleas for certain oxen. The defendant denied the taking, or that the plaintiff was the owner. It appeared that the plaintiff was the owner and in possession at the time the defendant, a deputy sheriff, attached the oxen as the property of one Harding, and that the plaintiff gave the defendant a receipt promising to deliver the same to the defendant on demand, and retained them in his possession, and that they were afterwards demanded by the defendant. Nonsuit ordered on the ground that the plaintiff could not maintain the action, and the plaintiff brought the case here on exceptions to that ruling.

Harding, for the plaintiff.

Bulfinch, for the defendant.

By Court, **SHEPLEY, J.** The object of the writ of replevin is to redeliver goods and chattels, or to restore the possession of them to the person who has the general or special property in them. The statute prescribing the forms of writs, c. 63, sec. 8, requires the allegation to be made in the writ of replevin, not only that the defendant took the goods, but that he has "them unlawfully detained to this day." It appears from the bill of exceptions, that the defendant never had the actual possession of the goods alleged in the writ to have been detained by him, but that the plaintiff, at the time of the attachment and ever since, has had the possession of them. The plaintiff having receipted for the goods, as attached by the defendant, might ordinarily be regarded as holding them as the servant of the defendant, who would, in contemplation of law, have possession. But in this case the plaintiff has proved, that he was the owner of the property, and that the attachment was made wrongfully. Under such circumstances the defendant can not be regarded as having the constructive possession by his wrongful act, unless he has the legal right to obtain possession. He can have no such legal right unless it arises out of the receipt of the plaintiff. The terms of the receipt are not in the usual form; and the plaintiff does not therein admit, that the property was in the person against whom the attachment issued, or that it was in any third person. He has not thereby disabled himself to allege and prove it to have been his own property.

To maintain this suit the defendant must be proved to have been in the actual or constructive possession of the goods.

In a suit upon the receipt, by the defendant against the plaintiff, he may prove, that the property receipted for was not the property of the debtor, and that it has been restored to the owner; and the defense will be good: *Learned v. Bryant et al.*, 13 Mass. 224. This court has expressed its approbation of that case; and when speaking of the claims of the creditor, debtor, and owner, upon the attaching officer, says, "and if the true owner should call on him for it, he might defend himself by proving, that such true owner had already the property in his possession, or had availed himself of its proceeds, or in some way appropriated it to his own use and benefit:" *Fisher v. Bartlett et al.*, 8 Greenl. 122 [22 Am. Dec. 225]. Such proof has been offered in this case; the plaintiff being the true owner, has always had the possession, which can not be legally disturbed by the defendant.

The plaintiff failing to prove any such unlawful detention, either actual or constructive, as the statute requires, can not maintain this suit.

The exceptions are overruled, and the nonsuit is confirmed.

REPLEVIN FOR GOODS LIES, WHEN.—The decisions on this subject in this series are collected in the note to *Crocker v. Mann*, 26 Am. Dec. 688. See also *Root v. French*, 28 Id. 482 and note.

RECEIPTOR MAY SHOW ATTACHED PROPERTY NOT THE DEFENDANT'S, WHEN. This subject is discussed in the note to *Bursley v. Hamilton*, 25 Am. Dec. 426. See also *Morrison v. Blodgett*, 29 Id. 653. That a receiptor is not estopped to claim property in himself, unless the receipt is so framed as to constitute an estoppel, is a point to which the principal case is cited: *Blaven v. Freer*, 10 Cal. 176.

HAYWARD v. SEDGLEY.

[14 MAINE, 439.]

PARTY IN POSSESSION OF LAND MAY MAINTAIN TRESPASS against a stranger for cutting trees thereon, though he has conveyed to a third person who has never entered into possession.

TRESPASS *quare clausum fregit*, for cutting down and carrying away wood. The plaintiff was in possession at the time of the trespass, though he had previously conveyed by absolute deed to one Bolton, who had never entered into possession, and he could show by parol testimony, if admissible, that the conveyance was intended as a mortgage, and that the mortgage debt

had been paid. The defendants did not claim under Bolton. It was agreed that a nonsuit or default should be entered, in accordance with the opinion of the court upon these facts.

D. Williams, for the plaintiff.

Vose, for the defendants.

By Court, *SHEPLEY, J.* The plaintiff, at the time the trespass was committed, was in the actual possession of the premises, although he had before that time conveyed the same to a third person, who has never entered into possession.

Possession is sufficient to maintain this action. And any possession is a legal possession against a wrong-doer: *Graham v. Peat*, 1 East, 244. The objection in this case is, that the injury is to the freehold, and that the owner only can maintain the action for such an injury. But the cases cited and relied upon tend only to show, that the owner may have his action for his injury, although there be a tenant in possession; not that the tenant may not also have his action for his injury. The case in the Year Book, 19 Hen. VI. 45, decides, that a tenant at will may have an action for injury to the soil, and the landlord also for his injury. The same rule applies to the cutting of trees. If trees are cut upon the land of tenant at will, he may have an action of trespass: Roll. Abr., Trespass, n. 4; Com. Dig., Trespass, B, 2. The principle is quite explicitly stated in note 2, Co. Lit. 57, a: "If a stranger cuts trees, the tenant at will shall have an action, as shall also the lessor, regard being had to their several losses."

Whether the owner can in this case, maintain an action of trespass, it is not now necessary to decide. It has been decided in Massachusetts, that he can: *Starr v. Jackson*, 11 Mass. 519; and in New York that he can not: *Campbell v. Arnold*, 1 Johns. 511.

No question is raised in the case respecting the amount of damages, and the plaintiff being entitled to maintain the action, the defendants, according to the agreement, are to be defaulted.

POSSESSION TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT, necessity of: See *McClain v. Todd's Heirs*, 22 Am. Dec. 37, in the note to which the previous cases in this series on the same subject are collected. See also *Van Rensselaer v. Radcliff*, 25 Id. 382; *Wilsons v. Bibb*, Id. 118; *Cannon v. Hatcher*, 26 Id. 177. That possession alone is sufficient to maintain the action against all the world except the real owner, see *Evertson v. Sutton* 21 Id. 217; *Finch's Ex'rs v. Alston*, 23 Id. 299; *Duncan v. Potts*, 24 Id. 766; *Wilsons v. Bibb*, 25 Id. 118.

MASON v. BRIDGE.

[14 MAINE, 468.]

UNDER A CONTRACT PROVIDING THAT A THIRD PERSON SHALL INSPECT "all the work and materials" for a dam which one party has contracted to erect for another, and that they shall be "made to correspond with the decision of such person in all respects, whose decision shall be final between the parties," such person has power only to inspect the work and materials, and not to determine the construction of the contract.

CONTRACT FOR THE ERECTION OF A DAM providing that "the wall [is] to be laid on timber and projected into the bank fifteen feet," requires, where the bank slopes at an angle of forty-five degrees, only that the wall should be projected into the bank on an average of fifteen feet from top to bottom, and not fifteen feet on top.

WHERE SUCH CONTRACT PROVIDES that the dam shall be "of the same height, thickness, and quality of work as the old dam now standing," and part of the top of the old dam is unfinished and has only the front stones laid up to the required height, the new dam must be of the same thickness throughout as the old one would have been if completed.

ASSUMPSIT for work and materials furnished for the construction of a certain dam for the defendant. The terms of the contract so far as material, and the questions arising thereon, are sufficiently stated in the opinion. Verdict for the plaintiff, and motion for a new trial.

D. Williams, for the defendant.

Vose, for the plaintiff.

By Court, SHEPLEY, J. The plaintiff contracted, under seal, with the defendant, to build a stone dam across Bridge's brook, which was afterwards built; and that contract was settled. The present action is for work, and labor, and materials, found for the same dam; and the plaintiff alleges, that the labor and materials now sued for were not required by the written contract to be furnished. To ascertain what portion of this work did not come within the contract, it becomes necessary to decide upon the true construction of it. The first difference arose respecting the powers of a third person, to whom, by the contract, certain matters were referred. The defendant contended, that he was to decide all differences between them, as well what the contract required of each of them, as other points of difference. While the plaintiff contended, that he was only to decide upon the workmanship and the materials. The language of the contract is: "and it is mutually agreed between the parties, that all the work and materials shall be inspected by a third person, and made to correspond with the decision of

such person as may be selected, in all respects, whose decision shall be final between the parties." It was the work and materials, which were to be inspected, and were to be made to correspond with the decision. There is no intention exhibited of giving him any power to determine other differences than those which related to the workmanship, and to the fitness and quality of the materials proposed to be used. He can not decide upon matters not expressly referred to him. What a legal construction of the contract required of the parties, not having been submitted to him, the law, and not the arbitrator, must decide.

Another clause of the contract upon which a difference arises, reads: "the wall to be laid on timber and projected into the bank fifteen feet." The case finds, that "the slope of the bank was upon an angle of forty-five degrees, and it was ascertained that the end of the dam being made plumb, would enter the bank eleven feet more at the bottom than at the top; and therefore, if it entered at the top nine feet and a half, it would, upon an average, be projected into the bank fifteen feet." The plaintiff contended that this was all that the contract in this particular required of him; while the defendant insisted, that the dam was to be so constructed as to extend into the bank fifteen feet, measuring at the top of the bank; which would make it necessary to extend it into the bank twenty-six feet at the bottom.

The dam was constructed as the defendant desired, subject to the right of the plaintiff to claim compensation for the difference, if he was not by the contract obliged thus to build it. It is not contended, that the dam should have been so built as to slope in conformity to the bank. If the bank adjoining the stream had been perpendicular, there could have been no doubt respecting what the contract required. The cubic feet of earth to be removed, and of wall to be erected, would have been made certain. It can not be supposed that the parties entered into the contract without some estimate in their own minds of the labor to be performed in removing the earth and laying up the stones. The peculiar angle of the bank should require neither more nor less labor to be performed, unless there is some evidence in the contract that such was the intention. The contract contains no such intimation; and in the absence of it, the construction should be such as would exact the same amount of labor and materials, whatever might be the angle of the bank. The peculiar formation of the bank can make no

difference in the legal construction of the contract. There can be no difficulty in ascertaining by testimony how many feet of wall the plaintiff has built, beyond what this construction of the contract would require, and for that, and any other labor occasioned by it, he would be entitled to recover a reasonable compensation. And this is understood to have been in substance the instruction given.

Another subject of difference had reference to the manner in which the dam should be constructed near the top of it. The terms of the contract in relation to this subject were, that the dam should be built "of the same height, thickness, and quality of work as the old dam now standing." The case finds, that "about two feet in height, of the upper part of the old dam, had only the front stones laid up; and when the plaintiff had carried up the new one in the same manner, he stopped and insisted that he had done what his contract required." The defendant contended, that the wall was to be carried up as high as the top of the old dam, of an uniform thickness. The plaintiff did so finish it, and claims pay for it, as not being required by the contract. The only testimony in the case, respecting the condition of the top of the old dam, states, that it was "manifestly left unfinished;" and such must be taken to be its true condition, as presented to the eye.

The intention of the parties is to be ascertained from the language, which they use, and is to be carried into effect. What could have been the design in referring to the thickness and height of the old dam? Was it to give a general outline of the dimensions, or was it intended to require an exact conformity in all respects to it? If the latter is the true construction, the plaintiff would have been obliged so to construct it as to present precisely the same thickness in the new as in the old one, in each particular part of it; and if the old one presented an uneven surface, whether occasioned by time, accident, or formation of the stones, the new one must conform to it.

So, if one or more stones had fallen out, or had been omitted in building, no matter in what part of the old dam, the plaintiff, upon this construction, might have left the same defects in the new one. Can it make any difference whether the defects were at the top, or in any other part of the dam? Could the plaintiff have intended to be bound by his contract to make a *fac simile* of the old dam? Or did he understand the intention to be, that he should build a new and "good, substantial stone

dam," and present it to the eye of every beholder "manifestly left unfinished"? The construction contended for by the plaintiff is quite too absurd to admit of its being regarded as the true one. A rational and practical execution of the contract rejects it, and adopts the former construction as the true one. The plaintiff is not entitled to recover for this part of his claim, as a proper execution of the contract required the performance of this service.

The verdict is set aside, and a new trial granted.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

HAYS v. MILES.

[9 GILL & JOHNSON, 193.]

CREDITOR OF A DECEASED HEIR, showing by petition filed in a suit brought by the children of such heir for a decree for the sale of the intestate ancestor's estate, and the distribution of the proceeds among the heirs, that he is a creditor of such heir for goods sold her while a *feme-sole*, and that she afterwards married and died, leaving no assets liable for the payment of her debts, makes a *prima facie* case, entitling himself to payment of his claim out of the share of the proceeds of the intestate's realty awarded to the deceased heir's children.

PETITION IS THE PROPER MODE OF AFFECTING A FUND in equity, where no other parties are to be brought in to litigate the question than such as are or should have been parties to the original bill, though it is otherwise where additional parties are required.

APPEAL from a decree in chancery dismissing a petition filed by Hays, the appellant. The original bill was filed by certain infant children and heirs of Elizabeth Jarboe, deceased, who was one of the children and heirs of John Benson, deceased, against the other heirs and the administrator of the said Benson, for a decree for the sale of certain real estate of which he died seised, and the distribution of the proceeds among his heirs. The appellant's petition set out the original proceedings, and alleged that the said Elizabeth Jarboe survived her father, John Benson, being at the time intermarried with one John Jarboe; that the complainants in the original bill were her children by former marriages, she having had no children by Jarboe; that during her widowhood she became indebted to the petitioner for certain goods sold by him to her, which indebtedness had never been paid; that she died long after her

father, leaving her husband John Jarboe surviving her, who became her administrator by operation of law, but had no assets liable in law or equity for the payment of her debts. The petitioner joined in the prayer of the original bill that the said realty might be sold, and that, out of the proceeds coming to the original complainants as the heirs of the said Elizabeth, the petitioner's claim should be first paid. A subpoena was prayed against the complainants, and also against John Jarboe. Exhibits showing the nature of the indebtedness to the petitioner, etc., accompanied the petition. The land in question was decreed to be sold, and sold, but the petition was afterwards dismissed.

J. Johnson, for the appellant.

No counsel, *contra*.

By Court, ARCHER, J. The petitioner alleging himself to be a creditor of Elizabeth Jarboe, one of the heirs-at-law of John Benson, whose estate was sought to be sold by the complainants, appears to us to have presented a *prima facie* case, for the interposition of a court of equity, and to have presented it in a competent form.

Upon the establishment of his claim, we could see no possible objection to the chancellor's assuming jurisdiction, unless he ought to have sought relief by an original bill instead of a petition. The appellant has prayed a subpoena against John Jarboe, who was not a party to the proceedings in which the petition was filed, nor does it appear that he was a necessary party, either to the bill or petition; for it is not apparent that he was entitled to be considered as a tenant by the courtesy, and if he was not, he had no interest in either controversy, and the petitioner might have dismissed the petition as to him, and proceeded against the other persons interested, from whom he sought an answer. But if he ought to have been a party to the original bill, it could not be objected, that he had made him a party to the petition, as in that case he might have had an interest in resisting the claim.

A petition may not in all cases be the proper course to reach a fund in chancery: as where new parties are to be made, not necessary to have been made to the original bill, and where the investigation may involve inquiries calculated, by protracting the cause, to delay other parties not having an interest in such controversy. But we think it may be safely stated as a general rule, that a petition is the proper mode of affecting a fund in equity where no other parties are to be brought in to

litigate the application, than such as are, or ought to have been parties to the original bill.

A decree will be signed, reversing the decree of the chancellor, dismissing the petition of the appellant, and the cause will be remanded to the chancellor for further proceedings.

Decree reversed.

Followed, in respect to the summary method here pursued, in *Griffith v. Parks*, 32 Md. 5.

CREDITOR'S INTEREST IN DECEDENT'S ESTATE is paramount to the title of the heirs and devisees, and to the will of the executor: *Bruch v. Lantz*, 21 Am. Dec. 458; but this interest is not of such a nature as to preclude the legislature from repealing the laws authorizing sales of the estate to pay the debts: *Ludlow v. Johnson*, 17 Id. 609.

REGENTS OF THE UNIVERSITY OF MARYLAND v. WILLIAMS.

[9 GALL & JOHNSON, 365.]

CORPORATION MAY BE PRIVATE, though its charter contain provisions of a public character, introduced solely for the public good, as a general police regulation of the state.

UNCONSTITUTIONAL PROVISION IN A STATUTE renders such statute void only so far as that provision is concerned.

POLICE OR SANITARY REGULATION IN THE CHARTER of a medical institution, providing for the examination and licensing by such institution of persons seeking to practice medicine, and for the payment of a fee therefor, and imposing a fine for practicing without such license, creates no vested right in the corporation which will prevent a repeal of such regulation.

CORPORATION AGGREGATE IS AN ARTIFICIAL INTELLECTUAL BEING, the mere creature of the law, composed generally of members acting in their natural capacity, but it may be composed of persons acting in a political capacity as members of other corporations.

ACT OF 1812, CREATING THE CORPORATION of the "Regents of the university of Maryland," did not destroy or merge in it the corporation of the "Regents of the college of medicine," existing under the act of 1807, but both continue as separate and distinct corporate bodies, with unimpaired rights and franchises, their respective powers being entirely compatible.

PUBLIC CORPORATION IS ONE CREATED FOR POLITICAL PURPOSES and with political powers, to be exercised for the public good in the administration of civil government, and is subject to the control of the legislature.

CORPORATION OF "REGENTS OF THE UNIVERSITY," etc., is not a public corporation.

SUBSEQUENT ENDOWMENT of a private eleemosynary corporation by the state does not constitute it a public corporation.

AUTHORITY TO RAISE MONEY BY A LOTTERY does not constitute an endowment of such an institution.

CORPORATION ESTABLISHED FOR A PUBLIC END is not necessarily a public corporation.

GOVERNMENT HAS NO RIGHT, WITH RESPECT TO ELEEMOSYNARY CORPORATIONS, to inspect, regulate, or control them or their funds and franchises as it has in the case of public corporations, but that power resides in the visitors.

INCORPORATED COLLEGES AND ACADEMIES, endowed with property by public or private donation, are private eleemosynary corporations, and of this character is the corporation of "Regents of the university."

REGENTS OF THE UNIVERSITY OF MARYLAND ARE THE VISITORS of that corporation.

CHARTER OF A CORPORATION IS A CONTRACT when accepted, and an act impairing its obligation is void.

ACT OF 1825 ABOLISHING THE BOARD OF REGENTS of the university of Maryland and making other important changes in the corporation, impairs the obligation of the charter, and is unconstitutional and void.

LEGISLATURE HAS NO RIGHT TO REVOKE OR ALTER THE CHARTER of a corporation, or take away its franchises or property, without its consent, independently of any express prohibition in the constitution of the United States or of this state, the property of such a corporation being under the protection of the fundamental principle of right and justice, inherent in the social compact, in this country at least, which protects the property of private persons.

LEGISLATIVE OUSTER OF CORPORATION INVALID.—An act abolishing a corporation and transferring its property to another, would, if effectual, amount to a legislative ouster or judgment of dissolution, and is therefore in violation of those provisions in the bill of rights requiring the different departments of the government to be kept separate, and forbidding any freeman to be deprived of his property except "by the judgment of his peers, or by the law of the land," such an act being a sentence rather than a law, since it affects only the particular corporation.

OFFER OF AN ACT AMENDING THE CHARTER of a corporation, for the acceptance of such corporation, is implied without express words, in the passage of the act; but where the act abolishes the corporation and transfers its franchises to another, there is nothing for the corporation to accept.

ASSENT OF A CORPORATION TO AN ALTERATION OF ITS CHARTER may be inferred, without any written instrument or vote, from acts demonstrative of such assent.

ACTS FROM WHICH SUCH ASSENT WILL BE INFERRED must be corporate acts, acts of the corporation or of its authorized officers or agents, and the unauthorized acts or declarations of individual members of the corporation, in taking positions under the new act, or the like, furnish no evidence of such assent.

NON-USER OR MISUSER of corporate franchises has never been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared.

SURRENDER OF CORPORATE FRANCHISES is not to be presumed from non-user; that can only be effected by deed to the state.

ASSENT TO ACT DISSOLVING CORPORATION will not be presumed from mere non-user of its franchises.

RESIGNATION OF AN OFFICE in a corporation may be made either by express agreement between the officer and the corporation, or by an implied agreement from his being elected to another office incompatible with it. **BY "ANOTHER INCOMPATIBLE OFFICE"** is meant another office in the same corporation.

TAKING A SITUATION UNDER A VOID CHARTER or act of incorporation is not a resignation of a situation in another existing corporation.

THE FACT OF INCORPORATION HAVING BEEN SHOWN, the burden of showing a dissolution of the corporation rests upon those who wish to establish such dissolution.

A CORPORATION IS COMPOSED of distinct, definite integral parts, where each faculty consists of a definite number of men; and to constitute a corporate meeting, the attendance of a majority of the members of each class is necessary.

NON-USER OR MISUSER ON THE PART OF A CORPORATION can not be taken advantage of in a collateral action.

THERE ARE TWO MODES OF ENFORCING FORFEITURE OF A CHARTER: by *scire facias* where a legally existing corporation has abused its power, or by *quo warranto* where a *de facto* corporation has exercised the powers of a legal corporation.

A CORPORATION IS ENTITLED TO A FULL HEARING before judgment of dissolution is rendered.

ASSUMPSIT, for money had and received to the plaintiffs' use. Pleas, the general issue and statute of limitations. The plaintiffs gave in evidence the acts under which they were incorporated, the various acts alluded to in the opinion, the minute book of the board of regents of the university of Maryland, and evidence in regard to several amounts received by the defendant as treasurer. The defendant gave in evidence an act of 1825, c. 190, creating the trustees of the university of Maryland, the proceedings of the trustees appointed under said act, the reappointment of several of the professors by the trustees, the fact of the exclusive possession by the trustees of the buildings, grounds, property, and funds of the university, and that the regents had discharged none of the duties incident to their office from the time of the organization of the board of trustees under the act of 1825 until September 18, 1836. The exceptions taken appear from the opinion. Verdict and judgment for the defendant. The regents thereupon appealed.

Evans, Mayer, Martin, and Meredith, for the appellants.

Nelson and R. Johnson, contra.

By Court, **BUCHANAN, C. J.** A variety of questions arise in this case, which is one of a grave and delicate character; im-

portant as respects the interests involved, and the results to the community. What may be the effect of the decision of this court (whether beneficial or otherwise), upon the usefulness and future operations of the university, we do not know, nor is it our business to inquire; looking only, and with a single eye, as it is our duty to do, to the questions alone submitted to us, and seeking to decide them according to the principles of law governing such questions, whatever the consequences may be. Grave and delicate, as it draws in question the validity of an act of the legislature of the state, we are not insensible to the caution with which such questions should always be approached, nor the deliberation with which they should be examined; accompanied by a becoming deference to the legislature, and its high and important functions, and a just regard to the duties and character of the judicial office.

It has been said that a legislative act should not be pronounced unconstitutional or invalid in a doubtful case: nor should it, where the doubt is *bona fide* and well founded, and not the result of a disinclination to deny the authority of the legislature, which all must feel, but none should yield to in violation of a solemn duty. But where a judge is satisfied upon full consideration that an act of the legislature is contrary to the constitution of the United States, the supreme law which he is bound to obey, and which must prevail over any act that comes in conflict and can not stand with it, or is for any other reason invalid, he has no choice; and all that is left him is honestly and fearlessly to do his duty; from the faithful discharge of which, however unpleasant the task, no upright judge can shrink if he would. On the other hand, a judge should not suffer himself to be betrayed to pronounce an act unconstitutional or invalid on insufficient grounds, by a morbid apprehension that a contrary decision might be ascribed to the want of a just and proper sense of judicial duty. Thus impressed, we proceed to the examination of this case; and the first question presented by the record, and which meets us at the threshold, arises on the first bill of exceptions, upon an objection by the counsel of the appellants to the admissibility in evidence of the act of the legislature of this state, passed at the December session, 1825, c. 190 (which was offered in evidence on the part of the defendant, and admitted by the court below), on the alleged grounds of its being contrary to the constitution of the United States, and to the bill of rights and constitution of this state, and is also raised on the first prayer in the fourth exception. The

consideration of which involves other questions upon which the validity of that act depends.

By the act of 1798, c. 105, a number of persons were incorporated under the name and title of "The medical and surgical faculty of the state of Maryland," with authority to elect twelve persons to be styled "The medical board of examiners for the state of Maryland," whose duty it is declared to be, to grant licenses to gentlemen qualified to practice medicine and surgery, upon the payment to the treasurer of the faculty by each person so obtaining a certificate or license, of a sum not exceeding ten dollars, to be fixed on or ascertained by the faculty. And the sixth section subjects persons who shall practice in either of those branches, and receive payment for his services, without having first obtained such license, to a penalty of fifty dollars for each offense, to be recovered in the county court where he may reside, by bill of presentment and indictment, one half for the use of the faculty, and the other for that of the informer.

The second section of the act of 1807, c. 53, provides for the establishment in the city or precincts of Baltimore, of a college for the promotion of medical knowledge, by the name of "The college of medicine of Maryland," to be founded and maintained forever. And the third section declares, that the members of the board of medical examiners for this state, for the time being, together with the president and professors of the college of medicine, shall be one community, corporation, and body politic, by the name of "The regents of the college of medicine of Maryland;" thus constituting those two separate and distinct bodies, as might well be done, one corporation; and making them the regents or governors of "The college of medicine of Maryland," for the management and conduct of which they were thus incorporated.

The fourth section gives to the regents the power to acquire, dispose of, and employ real and personal estate for the purposes of the college.

The ninth section authorizes and empowers the regents from time to time to constitute and appoint (without restriction as to number) professors of the different branches of medicine, to be "severally styled professors of such branch as they shall be nominated and appointed for, according to each particular nomination and appointment," and also to appoint lecturers in like manner. "The professors and lecturers so constituted and appointed from time to time," to be known and distin-

guished by the name of "The medical faculty of the college of medicine of Maryland."

The twelfth section authorizes the granting diplomas, and admitting students of the college and others, to the office and profession of surgeon, and to the degrees of bachelor and doctor of medicine.

The sixteenth section appoints six persons by name to be professors, until further arrangements made by the regents of the college.

The eighteenth section constitutes "the medical and surgical faculty of the state of Maryland," the patrons and visitors of the college; and other sections give to the regents the power to appoint a president, to have and to use one common seal, and one privy seal, and the capacity to sue and be sued, etc.

The first section of the act for founding "an university in the city or precincts of Baltimore," passed at the December session, 1812, c. 159, provides that the college for the promotion of medical knowledge, by the name of "the college of medicine of Maryland" be and the same is hereby authorized to constitute, appoint, and annex to itself the three other colleges or faculties, viz., the faculty of divinity, the faculty of law, and the faculty of the arts and sciences, and declares, "that the four faculties or colleges thus united, shall be and they are hereby constituted an university by the name and under the title of the university of Maryland."

By the third section it is enacted "that the members of the said four faculties, with the provost of the said university and their successors, shall be and are hereby declared to be one corporation and body politic, to have continuance forever, by the name and style of 'the regents of the university of Maryland,' with capacity to acquire, enjoy, and dispose of real and personal estate, for the purposes and interests of the university."

The seventh section gives authority to the regents to appoint a provost of the university.

The eighth section provides that "each faculty shall possess the power of appointing its own professors and lecturers."

The tenth section provides "that the professors now appointed and authorized in the college of medicine of Maryland and their successors, shall constitute the faculty of physic; that the professor of theology, together with six ordained ministers of any religious society or denomination and their successors, shall form and constitute the faculty of divinity; that the professor of law, together with six qualified members of the bar,

and their successors, shall form and constitute the faculty of law; and that the professors of the arts and sciences, together with three of the principals of any three academies or colleges of this state, and their successors, shall form and constitute the faculty of the arts and sciences."

By the ninth section each faculty is authorized to exercise such powers as shall be "delegated" to it by the regents of the university, for the instruction, discipline, and government of the institution, and of all students, officers, and servants, belonging to it—and the eleventh section provides that the regents shall meet at least once a year, in stated meetings, to be appointed by their own ordinances, "in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws," with authority when assembled, "to make their own rules of proceeding, and to make fundamental regulations for the government and discipline of the university," and declares that at all such meetings "a majority of the whole number of regents shall be a quorum to do any business, except to vacate the seat of the provost of said university, or of the professors or lecturers; for which purpose the consent of three fourths of the whole number of the regents shall be necessary, and then only on a formal impeachment," with other sections (as in the act of 1807, c. 53, for founding a medical college in the city or precincts of Baltimore) giving to the regents the capacity to sue and be sued; the authority to make and use one common and public, and one privy seal, and to grant diplomas and certificates of admission to the office and profession of surgeon, and to the degrees of bachelor and doctor of physic, etc. And the last section professes to repeal so much of the act of 1807, c. 53, for founding a medical college in the city or precincts of Baltimore, "as is inconsistent with, repugnant to, or supplied by" this latter act.

It has been asserted in argument, that the corporations created by these three acts are public and not private corporations; and hinted, rather than seriously insisted upon, that if they are to be considered and treated as private corporations, and the acts creating them as grants or contracts within the meaning and grasp of the tenth section of the first article of the constitution of the United States, which declares that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," the act of 1812, c. 159, violates the provisions of the two preceding acts of incorporation, and is itself unconstitutional and void.

These propositions will be examined. A corporation may be private, and yet the act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state; such as the Stat. 14, 15 Henry VIII., c. 5, creating the college of physicians in London, and imposing a fine on persons practicing without license from the college, which was held to be a private corporation: Gilb. Ev. 13; and the statute of the same reign, c. 42, founding the college of barbers and surgeons.

The provisions of the act of 1798, c. 105, making it the duty of the "board of medical examiners" to grant licenses to such as should apply, and who, on examination, should be found qualified to practice physic or surgery, on their paying to the treasurer ten dollars, and imposing a fine of fifty dollars on such as should practice without having first obtained such license, one half for the use of the faculty and the other for the use of the informer, are supposed to be practically infringed by the act of 1812, c. 159, founding the university of Maryland; by which authority is given to the regents to grant diplomas and certificates of admission to the office and profession of surgeon, and to the degrees of bachelor and doctor of physic, etc. Thus virtually, as it is said, removing the necessity for obtaining a license from the board of medical examiners, and in effect invading the rights of the medical and chirurgical faculty, and impairing its interest in the fees for licenses, and the penalty imposed for practicing without license from the board of medical examiners. The same may be said of the act of 1807, c. 53, by which the same authority is given to the regents of the college of medicine to grant diplomas and certificates of admission to the office and profession of surgeon, and the degrees of bachelor and doctor of physic, that is given by the act of 1812, c. 159, to the regents of the university. Of this supposed violation of the rights of the medical and chirurgical faculty, that institution is not here complaining, and to which no exception has ever been taken until now, for the first time, by this defendant, having no connection with that faculty, and professing to act as an officer or agent of a board claiming to be trustees of the university, to the charter of which, this alleged infraction of the corporate rights of the medical and chirurgical faculty is ascribed.

The charter of the university has no express provision dispensing with the necessity of a license to practice from the

board of medical examiners, nor authorizing graduates of that institution to practice without such license.

But admitting that to be the effect of the authority to grant diplomas, and that a student of the university having obtained a diploma, would not be under the necessity to procure any other license, and would be entitled to practice without subjecting himself to the penalty provided by the act of 1798, c. 105, and therefore would not be likely to incur the unnecessary trouble and cost of procuring any further license; and that such practical result is equivalent to a direct repeal of so much of the act of 1798, c. 105, as provides for the payment of ten dollars for a license to practice from the board of examiners, and imposes a fine for practicing without such license; and admitting also, that if such repeal would be a violation of the vested and chartered rights of the corporation, created by the act of 1798, and therefore void, and the defendant under the pleadings in this cause, has a right to avail himself of that defense, the most that can be said is, that the act of 1812, c. 159, is unconstitutional and void, so far only as it authorizes the regents of the university to grant diplomas, etc., and no further.

But are the rights here set up, as belonging to the medical and chirurgical faculty, such inviolable vested rights as are placed beyond the reach of legislative power?

The legislature possesses the power to regulate the internal police of the state; a political power imparted to that department of the government of which it is difficult to say it can entirely disrobe itself. It has, among others, the power to pass penal and sanatory laws, and to revoke them at pleasure, as circumstances and experience may require and teach; and having regard to the health and lives of the citizens of the state, to adopt from time to time such wholesome regulations as may be deemed best calculated to guard against the evils and mischiefs attendant upon the practice of physic and surgery by ignorant and incompetent persons.

That the legislature might at any time, without the intervention of a corporation, have provided for the organization of a board or boards, for the examination of persons applying for admission to the practice of physic or surgery, and imposed a penalty upon any who should practice without having first obtained a license from such board, and afterwards from time to time have adopted other means more or less efficient, for the promotion of the desired end; or, whether wisely or not,

have removed the restriction altogether, is a proposition not to be questioned.

Impressed as it would seem, with the sense of the evil consequences flowing from the pernicious practices of pretenders to the art, the legislature in 1798, as a general police regulation, embodied, as it had a right to do, in the act incorporating the medical and surgical faculty, with authority to appoint a board of examiners, not being of themselves a corporation, the provisions for examination and license by the board of examiners, on the payment of ten dollars by the party applying, and the prohibition to practice without such license, under the penalty prescribed.

The object is manifest. It was to encourage and promote the acquisition of knowledge in the profession, and thereby to shield the community from the pernicious effects of the ignorance of unskillful pretenders. And the board of examiners was resorted to as the means of effecting that end, and for that purpose may be considered as the agents or officers of the state. It is difficult to suppose that the legislature, in adopting that regulation of internal police, intended to part with the whole political power of the state over the subject, and to transfer and repose it entirely in the corporation of the medical and surgical faculty. The corporation acquired no vested inviolable right to that political power. The provisions under consideration were introduced, not for the regulation or promotion of private purposes or interests, but for a public purpose, the attainment alone of a public end—the prevention of mischief by the ignorant and unskillful, by the punishment of those who should be found offending against the law.

The examining and granting of licenses by the board of examiners to applicants proved to be qualified to practice, was not a franchise nor property, but in terms a duty imposed, and the allowance to the faculty of the fees for licenses, and a portion of the penalty imposed for practicing without license, was merely an incident of a public regulation.

To say that the act of 1812 is unconstitutional, because, by construction, a diploma granted to a graduate of the university may entitle him to practice without being subject to a fine for not having first obtained a license from the board of examiners, would be to deny to the legislature the power to pass any law rendering a license by the board of examiners unnecessary, however expedient the further exercise of that political power may be, which we are not prepared to do.

It has been said, too, that the tenth section of the act of 1812 is at war with and violates the eighth section of the act of 1798, but that will be seen, on a slight examination, to be an entire mistake. The eighth section of the act of 1798 provides that every person who shall be elected a member of the medical faculty, shall pay a sum not exceeding ten dollars, power being before given to the medical and chirurgical faculty to elect other members. By the "medical faculty" there spoken of, is clearly intended the "medical and chirurgical faculty" created by that act. There was no other medical faculty then in being, and none other could have been meant.

The act of 1807, c. 53, provides for a faculty consisting of professors and lecturers, to be called the medical faculty of the college of medicine; a separate and distinct institution from the medical and chirurgical faculty. The act of 1812, c. 159, authorizes the college of medicine to constitute and annex to itself three other faculties; and declares that the four faculties united, that is, the three to be created and the medical faculty (then existing) of that college, shall be a university. And the tenth section, directing how the four faculties of the university shall be constituted, provides that the professors now appointed and authorized in the college of medicine, shall constitute the faculty of physic; not the members of the medical and chirurgical faculty, for there were no professors in that institution; and by the "faculty of physic," evidently meaning the medical faculty, one of the four faculties constituting the university; and not the "medical and chirurgical faculty," to which it has no relation, and does not, in any manner whatsoever, interfere with the mode of appointing its members.

Again, it is suggested that the act of 1812, in some of its provisions, virtually repeals parts of the constitution of the college of medicine of Maryland, and professes by the last section, to repeal all such parts of the act of 1807, as are inconsistent with or repugnant to the latter act, and is therefore void; assuming the corporation of the regents of the college of medicine of Maryland, created by the act of 1807, to be a private corporation. And whether the corporation of the regents of the college of medicine is a distinct and independent corporation, separately existing as such in its original character, for the promotion of medical knowledge alone, or has been enlarged and expanded to the higher degree and rank of an university by the act of 1812, is the question that will be next examined.

By the act of 1807 it was provided, that there should be a college for the promotion of medical knowledge, by the name of "The college of medicine of Maryland," established in the city or precincts of Baltimore, to be founded and maintained forever, with a president and professors, and a faculty consisting of professors and lecturers, to be known by the name of "The medical faculty of the college of medicine of Maryland," to be appointed from time to time by the regents; and for the management or government of the institution, the president and professors, together with "the members of the board of medical examiners," were incorporated by the name of "The regents of the college of medicine of Maryland." Afterwards, the college being organized, the legislature by the act of 1812, c. 159, on the petition of the president and professors of the college of medicine of Maryland, as such, authorized "the college for the promotion of medical knowledge, by the name of the college of medicine of Maryland," to constitute, appoint, and annex to itself "three other colleges or faculties:" "the faculty of divinity," "the faculty of law," and the faculty of the arts and sciences; constituting the four faculties when thus united, an university by the name of "The university of Maryland," empowering the regents of the university to appoint a provost, and declaring the members of the four faculties together with the provost, to be one corporation and body politic, by the name of "The regents of the university of Maryland," omitting throughout "the board of medical examiners."

It is sufficient to say of a corporation aggregate, of which various definitions are to be found in the books, some fanciful and metaphysical, that it is an artificial intellectual being, the mere creature of the law, composed generally of natural persons in their natural capacity; but may also be composed of persons in their political capacity of members of other corporations, as in the case of *Christ's Hospital of Bridewell*, chartered by Edward VI., of which the mayor, citizens, and commonalty of London, are made the governors, and incorporated by the name of the governors, etc., of the hospital of Edward VI. of England, of Christ Bridewell—so in the cases of the universities of Oxford and Cambridge, of which the many colleges (distinct and separate corporations) within those universities, form component parts of those larger corporations. And the individuals, or any of them, who, in their natural capacity compose one corporation, may in the same capacity, compose another

distinct and separate corporation; as the president and directors of one bank, or any number of them, may be the president and directors of another bank, or the incorporated managers of any other institution. These undeniable propositions kept in view, will assist in the examination of the question under consideration.

The president and professors of the college or faculty for the promotion of medical knowledge called the college of medicine of Maryland, constitute that college or faculty; and the regents of the college of medicine, differently constituted, are made the governors and managers of the institution. The act of 1812 authorizes, not the regents, but the college for the promotion of medical knowledge, consisting of the president and professors, to constitute, appoint, and annex to itself, the three other colleges or faculties; thus by the use of the words other colleges or faculties, treating and considering the college as itself a faculty, composed of natural persons, having the capacity to act, and through whose agency alone, as natural persons, it could constitute and appoint the other colleges or faculties. If it had been the intention to give the authority to the corporation as such, it would have been given to "the regents of the college of medicine," and not to the college or faculty; which with their assent could as well have been done. But no such assent appears, and the fact, that in the petition of the president and professors of the college upon which the act of 1812 was passed, they ask that "they and others and their successors may be incorporated as regents of an university, to be called the university of Maryland," shows that the legislature acting upon that petition, meant by the college for the promotion of medical knowledge, by the name of the college of medicine of Maryland, the faculty or the president and professors constituting the faculty, as distinguished from the corporation of regents.

The corporation of the regents of the college, independent of the constitution of the United States, or the bill of rights and constitution of this state, is not destroyed or merged in the corporation of the regents of the university; which was originally to be composed of the provost, with the members of the four faculties, omitting the members of the board of examiners (a component part of the regents of the college), neither of them being of itself a corporation. That is, the members of the faculty (then existing) of the college, and of the three other faculties to be created; with power given to each, to appoint its

own professors and lecturers. The corporation of "The regents of the college of medicine," and the corporation of "The regents of the university," are presented by the acts of 1807 and 1812, as two ideal artificial beings, existing only in contemplation of law, both composed of natural persons and acting through and by the natural agents or persons composing them, respectively. And the professors of the college of medicine originally made members of the corporation of "The regents of the university," in their natural capacity, and not in a political capacity of members of another corporation; but not therefore ceasing to be members of the corporation of the regents of the college, which is not more incompatible with the separate corporate existence of the two institutions, than if they had been made the president and directors of an incorporated bank, or been incorporated alone, or with others, as the governors or managers of any other institution, nor more than the individuals composing any corporation, and at the same time becoming members of another corporation, would be with the continued existence of both corporations. The corporations of London, and of Christ's hospital of Bridewell, are separately existing corporations, although the mayor, citizens, and commonalty of London, are incorporated by the name of the governors, etc., of the hospital, etc., of Christ Bridewell; so the many colleges within the universities of Oxford and Cambridge, are separate and distinct corporations from each other, and from the larger corporations of those respective institutions.

On the sixth of January, 1813, the faculty of physic of the college of medicine of Maryland, appointed and annexed to itself the three other faculties of divinity, law, and the arts and sciences, in pursuance of the act of 1812, and on the twenty-second of April, 1813, at a meeting of the regents of "the university of Maryland," a provost and secretary were elected.

Although on the original organization of the university, the professors at that time appointed and authorized in the college of medicine, constituted the faculty of physic of the university under the tenth section of the act of 1812; yet it did not follow that they were always to compose that faculty. On the contrary, the words of that section, the professors now appointed and authorized, etc., would seem to imply that they might not, but that as the vacancies occurring from time to time should be filled up, it might become constituted in whole or in part of other persons, there being no restriction in the selection to the professors of the college, and very properly. For if it were

otherwise, the faculty itself might become extinct by the dissolution or forfeiture of the corporation of the college. Besides, if the professors of the college of medicine and their successors, were necessarily at all times to compose the faculty of physic in the university, as the regents of the college have alone the power to appoint their own professors, the faculty might thus become constituted of incompetent persons, by the injudicious appointment of professors by the regents of the college (should that at any time happen), to the great prejudice of the character and usefulness of the university, without the means of guarding against such a result.

The college of medicine then, and the university, exist in contemplation of law, as distinct and independent corporations, in possession of all the rights and franchises conferred upon them by the acts of their incorporation, each having the power to keep and use a public and privy seal; to sue and be sued; to acquire and dispose of property, real and personal; to pass by-laws; to grant diplomas; and to perpetuate itself.

And there being nothing in the act of 1807 inconsistent with or repugnant to the act of 1812, the last section of the act of 1812 is wholly inoperative, without reference to the question whether the corporation created by the act of 1807 is a private corporation or not; nor could proceedings in nature of a *quo warranto* be sustained against the regents of the university, acting under the authority of the act of 1812, for usurpation of corporate franchises, in violation of the rights and franchises of the regents of the college of medicine. The enjoyment and exercise by each, of all the rights and privileges granted them, respectively, being entirely compatible, and the powers and authority of one not inconsistent with or opposed to the powers and authority of the other. The legislature having the same undoubted right to establish as many independent colleges and universities in Baltimore (not impairing the rights of others) as may be deemed expedient and proper, that it has to incorporate an additional number of banks.

The next subject of inquiry is, whether the corporation of "The regents of the university" is a public or a private corporation; if at this day, that can be considered an open question.

A public corporation, is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control

of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, etc.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general purposes of charity.

The corporation of the university has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government, or subject to its control in the due management of its affairs, and none of its property or funds belong to the government. The state was not the founder, in the sense of that term as applied to corporations. It was the creator only, by means of the act of incorporation, and may be called the incipient, not the perficient founder. It gave to it in its creation the capacity to acquire and to hold property, but made to it no donation; and whatever property the corporation has, is its own, to be managed and disposed of by the regents for the uses of the institution, in such manner as they may judge most promotive of its interests, and not for the uses of the government, nor in the exercise of any political powers, but as the trustees merely for the university. It is said there have been subsequent endowments by the state. If it be so, that can not affect the character of this corporation. If eleemosynary and private at first, no subsequent endowment of it by the state could change its character, and make it public. But it nowhere appears that any such endowments have been made. Several acts of assembly were passed, authorizing money to be raised by lottery for the use of the university; and by the act of 1821, c. 88, certificates of five per cent. stock of the state were authorized to be issued by the treasurer, to the amount of thirty thousand dollars, to be appropriated to the payment of the debts of the institution; the medical professors of the university being required to enter into bond for the annual payment of interest on that sum; which can scarcely be called endowments. The authority to raise money by lottery certainly was not; it was a mere privilege granted, which cost the state nothing; and the appropriation of the thirty thousand dollars to the liquidation of the debts of the institution, on the payment of interest by the professors of one of its faculties, assumes more

properly the shape and character of a loan to a private corporation for its own private purposes, than of an endowment or appropriation of money for the uses or political purposes of the government.

If it is a public corporation, and its members the officers or agents of the government, and the debts contracted in the due course of that agency, they were debts of the state, contracted by its own officers, which the state was bound to discharge, instead of lending money for that purpose, and taking security from the members of one of the faculties for payment of the interest, which will hardly be contended; and certainly the legislature acted upon no such principle.

But it has been urged in argument at the bar, that whenever the end is public, the franchise granted to effect that end is also public. That here, the end was the preservation of life and health, which depend upon the skill of those who minister to the sick, etc. A public end, in which the whole public have an interest, and therefore that this corporation is public. The same might be said with equal propriety of the college of physicians, and the college of barbers and surgeons, in London; where the preservation of life and health was as much the end as here; yet it has never been doubted that they are private eleemosynary corporations. The act incorporating the college of physicians was, as this, passed on the petition of certain individuals, and the preamble of the act incorporating the college of barbers and surgeons, as of this, recites the benefits and advantages accruing to the public from the establishment of such institutions; and each of those statutes imposes a penalty for practicing without license, which would seem to give to the corporation more of a public character than this, which has no such provision.

It is not enough to say, that the public has an interest in the skill and learning of physicians and surgeons. The public has a deep interest in the dissemination of learning and useful knowledge; and so it has in the beneficial results to the community of insurance, canal, railroad, and turnpike companies, etc. The uses or objects may, in a certain sense, be called public; but the corporations, as distinguished from the uses or objects, are private.

The objects for which almost, if not all corporations are created, are such as the government deems it expedient to promote, upon the supposition that they will be beneficial to the

public, and these expected benefits constitute the chief, and usually the only consideration of the grants.

The distinction is between the franchise granted, and the expected beneficial results to the community, from the possession and exercise of the franchise upon the performance of the implied condition of the grant to exert the rights acquired, in a manner suited to the promotion of the objects proposed. The institution, the bank, canal, railroad, college, etc., from the nature of its particular object, and the interest the public has in that object, may, and commonly does acquire, in a popular sense, the character of a public institution; but the corporation, the artificial being composed of natural persons for the management of the affairs of the institution, in contemplation of law is private; as much so as the individuals composing it were, before the act of incorporation imparted to them an artificial existence, with power to take and hold property in that particular form, and for particular purposes, which is all the act of incorporation does, and that only because the particular objects can best be effected in that particular form. But not therefore making the artificial being or corporation an instrument, nor the persons composing it members of the civil government of the country.

Suppose an association of private individuals had contributed funds in real or personal property, for the establishment and conduct of this very university (which, in legal understanding, would be a private charity), and had appointed professors, and constituted them governors and managers of the institution, and of the appropriated funds; the objects being the same as now, the promotion of religion and the dissemination of scientific, literary, and medical knowledge, and the interests of the public in those objects the same; could the governors so appointed be considered public officers, or members of the civil government? And if not, why should the artificial being created by law, and composed of the same persons for the same purposes, thereby become a part of the civil government, and a public corporation? A private charity can not, by a mere act of incorporation, be made a public one. In the language of Lord Hardwicke, "the charter of the crown can not make a charity more or less public, but only more permanent than it would otherwise be:" 2 Atk. 88;¹ and that is the settled law upon the subject.

Again, "a charity may be public, though administered by a

1. *Attorney-general v. Pearce.*

private corporation; and to hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions from the time of Lord Coke: 2 Kent Com. 273.

Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation. But it has no such right in relation to eleemosynary corporations, or the management of their affairs. That belongs to the visitors alone, under the visitatorial power incident to such corporations: Ang. & Ames on Corp. 410; 2 Kyd. on Corp. 174; 2 Kent Com. 299, 300; *Philips v. Bury*, 1 Lord Raymond, 5; S. C., 2 T. R. 346, etc. And where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character: 4 Wheat. 675;¹ Story, J., in *Philips v. Bury*, 1 Lord Raymond, 5; S. C., 2 T. R. 346; Ang. & Ames, 412; 2 Kent Com. 301.

The regents of this university are made the visitors by the terms of the act of 1812, the eleventh section of which authorizes them to "vacate the seat of the provost or any of the professors," and requires them to meet in annual and other stated meetings, "in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws." And all the authorities agree that colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, etc., considered and treated as private eleemosynary corporations.

It is the acknowledged law in England, received and acted upon in the courts of this country, and asserted by the elementary writers: *Philips v. Bury*, 1 Ld. Raym. 5; and 2 T. R. 346. Lord Hale's opinion confirmed by the house of lords: *Dartmouth College v. Woodward*, 4 Wheat. 518; *Allen v. McKeen*,² 1 Sumn. 276; *Society etc. v. New Haven*, 8 Wheat. 464, etc.; 1 Kyd on Corp. 25; Ang. & Ames on Corp.; 2 Kent Com., tit. Corporations. This then is a private eleemosynary corporation, differing from a college only in degree.

The extent of the property or funds it may have acquired by

1. *Dartmouth College v. Woodward*.

2. *Allen v. McKeen*.

donation or otherwise is not material; the capacity expressly given to acquire and hold property in perpetuity, for the uses and purposes of its institution, is the same thing, so far as concerns its character as a corporation, as the actual acquisition of it would be. It appears from the statement of the evidence, that it has been endowed to a small amount by private donations, and no donations that it can derive from the bounty of the state would change its character, and convert it into a public corporation.

That a charter or act of incorporation, when accepted, is a contract, is a proposition too self-evident and universally assented to, to be drawn in question, or to require the aid of argument or authority to support it. There is no *dictum* opposed to it to be found in the books; and it would be strange if there was, assuming (what is nowhere denied, and can not be) that the government can compel none to become an incorporated body without their consent; and that acceptance of an act or charter of incorporation, is necessary to the creation of a corporate body. The grant being of the powers and franchises conferred, and the stipulation on the part of the government, that they shall be held and enjoyed on the implied condition, that they are to be exercised in the promotion of the objects of the charter; and the acceptance being an implied undertaking on the part of the grantees, that they will, in consideration of the charter and the franchises granted, perform the condition; which, as it can not be forced upon them against their will, is necessarily a subject of contract, requiring the concurring assent of the parties respectively concerned, and ripens into a contract for the fulfillment of the terms of the charter, when that concurrence is manifested by acceptance. In *The King v. Pasmore*, 3 T. R. 97,¹ Buller, J., said: "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place."

The act of 1812, then, incorporating the regents of the university of Maryland, being by acceptance a contract between the state and the corporation, the organization and continuing existence of which have been recognized by various subsequent acts of the legislature, is it a contract protected by that clause

1. 3 T. R. 199.

of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts?" This question would seem to have been fully settled by the decisions in the cases already cited, of *Dartmouth College v. Woodward*, *Allen v. McKean*, and the *Society etc. v. New Haven*. The contract on the part of the state is, that the regents shall have the capacity and right to acquire and hold real and personal property in perpetuity in their corporate character, to sue and be sued, a power essential to the protection and enjoyment of the property they may acquire; to pass ordinances and make fundamental regulations for the discipline and government of the university; as governors and visitors to examine into all matters touching the discipline of the institution and the due execution of their laws, and to amove the provost or any of the professors on impeachment.

It can not be denied, that the franchises granted by the act of incorporation are vested rights, and can they be taken from the regents by any act of the legislature without impairing the obligation of the contract, that they shall be possessed and enjoyed by them and their successors in their corporate character? It is very clear they can not, and that no act of the legislature of the state can effect that object without the assent of the corporation, if the prohibitory clause of the tenth section of the first article of the constitution of the United States is applicable to such a contract as this; and no reason is perceived why it should not be held to apply as well to such contract as to any others, considering and treating this as a private corporation. Neither the character or nature of the contracts intended to be protected, nor of the contracting parties, is defined. The generality of the prohibition "no law impairing the obligation of contracts," without any description of contract or parties, or any words of restriction, would seem sufficiently to show the intention of an equally general and unrestricted application, and embraces in its letter such contracts as this. It is not meant to be denied that there may be contracts not within the spirit of, and therefore not embraced by this prohibitory clause. But this being a contract clearly within the words of the prohibition, it is for those who would exclude it from the operation and protection of the constitution, to show that a strict adherence to the letter would be so inconsistent with, or repugnant to the spirit of that instrument, as to authorize the making it an exception.

There is no known rule of construction that would justify or

permit an exclusion from the operation of the constitution of any contract plainly comprehended by its words, in the absence of anything to show that it is not within its spirit. What is there to be found in the constitution distinguishing contracts of this description from any other contracts, or tending, in the slightest degree, to show that they were not intended to be protected. There is nothing in their character to invite such a distinction, but much to invoke the aid of the framers of the constitution; and surely they are quite as worthy of protection as thousands of other contracts, confessedly shielded by the same provision of the constitution.

It has been suggested, that no consideration passed for this grant to give it the binding force of a contract, and that merely voluntary contracts are not within the prohibitory clause of the constitution. It is true, that the constitution did not mean, nor does it profess to create any new obligations, or to impart efficacy to contracts void in themselves. But it did intend to preserve the obligatory force of valid contracts; and the principle advanced is not applicable to this case, which does not rest in a mere voluntary engagement to grant, but was an actual grant, in consideration of the benefits expressed in the preamble to be derived to the community, of corporate franchises, which are incorporeal hereditaments, considered in law as property, and properly the subjects of grant, involving a contract that the state should not resume, and that the regents should hold and enjoy the grant, and all the rights derived under it; and it will scarcely be said, that such a consideration, the dissemination of learning and useful knowledge, in which the country has so deep an interest, is not a sufficient consideration, and that the payment of a pecuniary consideration is necessary to the validity of a grant by the state. Would it, or could it be said, that a voluntary donation from the state, by a grant of land to this institution, authorized to receive such donation, would be void, and that the land so given could be taken away again by the state at pleasure, and given to another? If not, neither can the franchises, the incorporeal hereditaments conferred by this act of incorporation, be taken away.

The principle is the same, equally applicable to both, and one is just as irrevocable and inviolable, as the other—property, though of different descriptions, being the subject of each—among the rights granted, is that of acquiring and holding property in perpetuity; and the state is pledged not only to the corporation, but to all donors to the institution on the faith of

this contract; and to revoke it, would be to violate the plighted faith of the state, that it shall remain inviolate. If the state has a right to revoke at will, this grant, it has the same right in relation to railroad, canal, and other corporations, which will not be pretended.

This brief view of the character and legal effect of the act incorporating the regents of the university, results in the opinion that it is a contract protected by the constitution of the United States, the obligation of which can not be impaired by any act of the legislature of the state, without the assent of the corporation; and leads to the conclusion, consequent upon that opinion, that the act of 1825, c. 190, is repugnant to that instrument, and therefore void. It recognizes the organization and existence at that time of the corporation created by that act, and states in the preamble that the good government and discipline of the university require important alterations in the act of incorporation. It professes to discontinue and abolish the board of regents, and the members of its several faculties, declaring that the faculties shall consist of professors alone; to appoint a number of persons by name, to be known by "the corporate title of trustees of the university" of Maryland; to invest them with all the powers and privileges before belonging to the corporation of the regents, with power to elect a vice-president, and to appoint and dismiss the provost professors, and lecturers, at pleasure; to establish new professorships and to abolish old ones; and to make by-laws for the regulation and discipline of the institution; declares that the governor of the state, for the time being, shall be *ex officio* president of the board of trustees; that all the pecuniary concerns of the university shall be under the control and direction of the trustees, who shall have power to appoint a treasurer, and direct and control all expenditures of money; that all money thereafter raised or appropriated for the benefit of the university, shall be paid to the trustees, or to an officer appointed by them to receive it; that all the rights of property then possessed by the regents, shall vest in the trustees; that vacancies occurring in the board of trustees shall be filled up by the executive of the state, and that, that act should go into effect and operation on the first day of June, 1826; and it professes to repeal all such parts of the act creating the corporation of the regents of the university, as are inconsistent therewith.

If it is possible to pass an act impairing the obligation of a contract, this is that act; if the act creating the corporation of

the regents of the university is, in legal understanding, a contract. It attempts to do more than impair the obligation of the contract. Except for the protecting shield held over it by the constitution of the United States, it would have the effect to annul it altogether, if there be not some inherent principle in the government of the state to forbid it. It not only aims to strip the existing corporation of the regents of all the privileges and powers conferred upon it by the act of its creation, but to destroy the old corporation, and to create a new one in its place; and to give to the corporation of its own creation all the same powers and privileges, with additional and important powers—such as the election of a vice-president, the appointment and dismissal of professors, lecturers, etc., at pleasure, and the establishment of new professorships, and the abolition of old ones; to cause all money raised or appropriated for the benefit of the university to be paid to the corporation of “the trustees,” and to vest in that corporation all the rights of property belonging to the corporation of the regents; thus not only to deprive the regents of the capacity to acquire and hold property in perpetuity in their corporate character, but to take from them the property they have already acquired and give it to the corporation of trustees, and to connect that corporation with the political power of the state, by declaring that the governor for the time being shall, *ex officio*, be the president of the board of trustees, and that the executive of the state shall fill up all vacancies occurring in the board of trustees.

“It is a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts:” 2 Bl. Com. 37. And by the act of 1812, it is expressly stipulated by the state, that this franchise, the corporation of the regents of the university, shall continue forever. And yet the act of 1825 professes, in words, to abolish the board (or corporation) of regents, and declares that the several faculties shall thereafter consist of the professors alone. It then proceeds to appoint and incorporate a number of other persons by name, to be known and distinguished by the corporate title of “the trustees of the university of Maryland,” and as if that was not enough, concludes with a repealing clause of every part of the act of 1812, inconsistent with its provisions; that is, to suffer so much of the act of 1812 as declares that there shall be an university established, to remain in force, but to annul entirely the existing corporation, and to create another, constituted of different persons, to possess and

exercise all the franchises (and more) granted to, and the property actually acquired by the former; keeping in mind, that in one case the corporate body, the artificial being composed of natural persons, the regents, is the corporation attempted to be destroyed; and that in the other, the corporate body, the artificial being composed of other natural persons, the trustees, is the corporation attempted to be created and substituted in its place, and not the university.

But the objection to the validity of the act of 1825 does not rest alone for support upon the construction of the constitution of the United States. Independent of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact (in this country at least), the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature can not pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power.

The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; they are alike beyond the reach of legislative power here, and the high prerogative power of the crown of England, which may create, but can not at pleasure dissolve a corporation, or without its consent alter or amend its charter.

The parliament of England has been said to be omnipotent. But restrained by public opinion, it has not undertaken to dissolve any corporation since the instances of the suppression of the order of templars in the time of Edward II., and of the religious houses in the reign of Henry VIII., and that power may be considered at this time as resting mainly in theory. When, in 1783, a bill was introduced for the purpose of remodeling the charter of the East India company, it was successfully opposed by Mr. Pitt and Lord Thurlow, as subversive of the law and constitution of the country; and in the strong language of Lord Thurlow, "an atrocious violation of private property, which cut every Englishman to the bone." And it might be said, that the possession and exercise of such a power by the legislature of this state, would cut every free citizen of Maryland to the bone; not that a corporation is clothed with

any peculiar sanctity, or that its property and rights are to be deemed more sacred and inviolable than the property and rights of any private individual. But, because the property and franchises of a corporation are private property, regarded as such by the law, and under the safeguard of the same principle that protects and preserves from legislative violation the property and rights of individuals in their natural character. The law knows no distinction; if one can be invaded, so can the other. Vested, corporate, and individual rights, resting for protection on the same principle, the power to violate the former would necessarily involve the power to prostrate the latter; which would be at war with the purposes for which the social compact was entered into; and the nature and ends of legislative power, would furnish no limit to the exercise of it, as it was intended they should do.

To say that the legislature possesses the power to pass capriciously or at pleasure a valid act, taking from one his property and giving it to another, would be in this age, and in this state, a startling proposition, to which the assent of none could be yielded; and yet there is nothing to forbid it, if it is once conceded that they have the power to dissolve one corporation, and take from it its franchises and property, without its consent, and transfer them to another. But the bill of rights, which, together with the form of government, composes the constitution of this state, is not silent upon the subject. The sixth article declares, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other."

The legislature, executive, and judiciary, are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned it, and can not rightfully exercise any power which is repugnant to that instrument, or not within their respective sphere of action.

The province of the legislative department of the government is to make laws, confining itself within the limits prescribed by the constitution. It can not usurp the powers confided to either of the other departments, without violating the declaration in the bill of rights, that they shall be forever separate and distinct from each other, which would be a subversion of the principles that lie at the foundation of the government. For if the legislature could, without control, exercise judicial as well as legislative powers, the tenure of everything dear and valuable to the citizen, would be, the unrestricted will of that

body; to guard against which, the provision was introduced for a division of the powers of the government.

It is not to be presumed that the legislature can ever have a wish, or would intentionally abuse or exceed its just powers. But it may (as it sometimes has done) incautiously and unadvisedly step beyond the strict limits of its authority; and it is the province and duty of a court, when called on judicially to decide upon the validity of the act, to pronounce it void if satisfied that it is not warranted by the constitution; that being the paramount law to which all acts of the legislature, not authorized by it, must yield.

This power and duty of the judicial department were asserted by the late general court in *Whittington v. Polk*, 1 Har. & J. 236, and have been since by this court, in several cases, among which are *Crane v. Meginnis*, 1 Gill & J. 463 [19 Am. Dec. 237], in which an act of assembly passed in 1823 divorcing C. Meginnis and Mary, his wife, and directing C. Meginnis to pay annually thereafter three hundred dollars to a trustee who is named, for the use of Mary Meginnis, was adjudged to be unconstitutional and void, so far as it directed the annual payment by C. Meginnis of three hundred dollars to a trustee for the use of Mary, on the ground that it was an exercise by the legislature of judicial power. The provision for the payment of the annuity being considered as a legislative decree of alimony, which is recoverable in this state only on proceedings in chancery. And in *Berret v. Oliver*, 7 Gill & J. 191, an act of the legislature declaring certain deeds and decrees to be void, and divesting certain persons named of real and personal property held under them, and vesting it in W. E. Berret, was pronounced to be a violation of the provision in the bill of rights, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other," and of the constitution of the United States, that "no state shall pass any law impairing the obligation of contracts," and utterly null and void.

The act of 1825 is obnoxious to the same objection. It professes to discontinue and abolish the corporation of the regents of the university; to appoint a board of trustees composed of different persons, under the corporate name of the trustees of the university of Maryland, "and to transfer to the new corporation thus attempted to be created, all the franchises and property of the corporation intended to be abolished; which, if effectual, would amount to a legislative ouster; a legislative

judgment of dissolution; an exercise of judicial power not warranted by the constitution. A sentence of ouster or of dissolution, being strictly a judicial act, for some imputed delinquency ascertained on proceedings at law instituted for that purpose, which, though assuming the garb of a law, the legislature not being invested with a judicial power, is not competent to pass without the consent of the corporation.

The division of the powers of the government proclaimed by the sixth article of the bill of rights, and the twenty-first article of the same instrument, declaring, "that no free man ought to be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land," were intended as restraints upon the legislative power, by means of the courts of justice in which the laws were to be administered, and where all would be entitled to be heard, and have an opportunity afforded them of asserting and defending their rights against any attempted invasion. By "the law of the land" is meant, by the due course and process of the law: Co. Ins. in the commentary upon the same words in *Magna Charta*. The general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice. An act which only affects and exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, "is rather a sentence than a law:" 1 Bl. Com. 44. A sentence that condemns without a hearing, and the very passing of which implies the absence of any general law or rule of civil conduct, by which the same purpose could be judicially effected in a court of law.

If the transferring one person's property to another, by a special and particular act of the legislature, is a depriving him of his property, by or according to the law of the land, then any legislative judgment or decree, in any possible form, would be according to the law of the land, although there existed at the time no law of the land upon the subject, and that too by a tribunal possessing no judicial power, and to which all such power is denied by the constitution. Such a construction would tend to the union of all the powers of the government in the legislature, and to impart the attribute of omnipotency to that department, contrary to the genius and spirit of all our institutions; and the office of courts would be not to declare the

law or to administer the justice of the country, but to execute legislative judgments and decrees, not authorized by the constitution. The act of 1825, therefore, though bearing the form of a law, being in effect a legislative judgment of dissolution of the corporation of the regents of the university, is, in this view of the subject, unconstitutional and void.

It is not intended by these remarks, to call in question the various general laws for quieting possessions, etc., which the legislature has been in the habit of passing, both before and since the adoption of the present constitution of this state, nor to impeach the decisions upon these laws, which have been considered as resting upon different principles; though it may be that the legislature has sometimes been unadvisedly drawn into the passing of such a law, to effect a particular purpose, not known to and concealed from that body at the time; which, if any such case exists, points to the necessity for great caution in the passing of such a law, and furnishes an additional reason for objection to the exercise by the legislature of judicial power.

In *Norris v. The Abingdon Academy*, 7 Gill & J. 7, an act of the legislature vesting the government of the academy in a new board of trustees, was decided by this court to be a violation of the rights of the old corporation, forbidden by the constitution of the United States, and therefore void. The decision of that case was founded upon the prohibitory clause alone of the constitution of the United States, which applies equally and with the same force to this, if there be nothing in the facts and circumstances of the case to exempt it from the operation of that instrument.

But it has been strongly urged, that if the act of 1825 was not passed with the previous consent of the corporation of the regents, there was enough to authorize the inference by the jury of a subsequent assent and acceptance. It is perfectly clear that there was no previous consent, nor any evidence whatsoever offered, tending in any manner to prove such consent. On the contrary, the only evidence relating to that point was that produced on the part of the plaintiff, with nothing offered on the part of the defendant to rebut it, or in any way to weaken its force. First, the report of a joint committee of the two houses upon which the act was passed. In that report it is stated by the committee, to be their opinion, that the charter of the regents "is radically defective, and requires fundamental alterations;" that the difficulty of getting a quorum of the regents to meet, and the want of time, prevented them from as-

certaining the opinion or wishes of the regents as a body, with respect to alterations of the charter; "that there is nothing in the nature of the act of incorporation which deprives the general assembly of the constitutional power of making the change proposed by them, without the formal assent of the persons incorporated, and that assent is only necessary when a charter of incorporation is in the nature of a contract, as a bank charter, for instance, where a bonus has been stipulated in favor of the state, and where a consideration which would give binding force to a contract has been paid." That report was adopted, and the changes proposed by the committee, embodied in the act founded upon it.

The proceedings then of the legislature, manifestly show that no previous consent had been given; but on the contrary, that the committee charged with that subject, had been unable to ascertain the opinion or wishes of the regents as a body in relation to an alteration of the charter, and that the legislature had been drawn into an error, and passed the act under the impression made by the ill-founded suggestion of the committee, that in the absence of a pecuniary consideration being paid for it, the charter had not the binding force of a contract, and therefore, that the consent of the corporation was unnecessary. And secondly, that on the seventeenth of March, 1826, soon after the act was passed (which was on the sixth of March, 1826, at the December session, 1825), at a regular corporate meeting of the board of regents, a resolution was adopted with but one dissenting vote, that a committee of five, who were appointed for that purpose, should take the opinion of counsel upon the constitutionality of the act, with another resolution unanimously adopted, directing the committee, if the opinion so obtained should be that it was unconstitutional, to prepare an address to the governor of the state, and to the trustees appointed for the government of the university, informing them of such opinion, and requesting them to defer acting until the act that had been passed, could be reconsidered by the legislature, and in the event of the trustees determining to proceed, to adopt such legal measures as might be deemed necessary to resist the operation of the act. And that the committee having obtained from counsel an opinion that the act was unconstitutional, on the twenty-second of May, 1826, and before the corporation of trustees went into operation, addressed a letter to the governor, and to each of the trustees, advising them of the opinion, and requesting them to suspend measures for car-

rying the act into operation until an application could be made to the legislature at their next meeting for a repeal of it; informing them, that they were prepared on the part of the regents to make such arrangements with them as would produce the speediest judicial decision of the question, if they should deem it inexpedient to accede to the proposed delay, and requesting a reply to that communication, which does not appear to have been made. So that, there was not only no evidence whatsoever, of a previous corporate assent to the act of 1825, but an unequivocal subsequent dissent, expressed by solemn corporate acts before it was carried into operation, or the arrival of the time (the first of June, 1826), when by its own provisions it was to take effect. Which subsequent dissent, and proceedings of the corporation of regents, independent of the report of the committee of the legislature, precludes the idea of any previous assent, and leaves no ground for presumption or inference of a subsequent assent prior to the first of June, 1826, when the trustees, in defiance of the corporation of regents, and in disregard of its dissent, thus solemnly expressed and formally communicated, organized themselves as a corporation, under the supposed authority of the act of 1825. Still it has been contended, that the conduct and course of the corporation of regents, after the organization of the corporation of trustees, were such, as to afford evidence proper and sufficient to be left to the jury, from which to infer the assent from that time, of the former, to the act for the incorporation of the latter, and its acceptance of that act.

It may well be questioned, whether, and indeed it is difficult to perceive how, an unconstitutional act of the legislature, can be made constitutional and valid, by a subsequent acquiescence in it. The whole community "have an interest in preserving the constitutional limitations upon the exercise of legislative power." How can the subsequent approval of, or assent to it, give to the legislature a power, which it did not possess at the time it was passed: and if it can not, how can it give effect to the act itself, which was passed without authority? But be that as it may, and to proceed: An act of incorporation may be offered for acceptance, and when accepted by those to whom it is offered, it becomes a contract. If the act of 1825 had been made to take effect when, or if assented to by the corporation of the regents, it would until that assent was given, have been *in fieri*; and when given, a law, if accepted by the trustees; and that would not have been unconstitutional. Parties to a

contract have a right to rescind it, and as between the state and the corporation of the regents, such a provision would have amounted to an offer on the part of the state to rescind the contract of the act of 1812, and if assented to by the corporation, would have been an abrogation of it. But no such offer was made. The act of 1825 was a peremptory and unconditional dissolution of the corporation of the regents; made by its terms, to take effect with or without its consent, and manifestly passed under the impression, that no consent was necessary.

It is not intended by what has been said, to deny that an act for altering a charter, to the passing of which, previous assent has not been given, can be constitutional, unless it contains an express offer for acceptance, or is made by its terms to depend upon a subsequent assent. The passing of it with nothing more, amounts to an offer only for acceptance; and if afterwards accepted, either expressly or by acting under it, it then receives life, and becomes an operative law—as in the cases of the various acts altering or amending existing bank and other charters.

And here it is proper to remark, that the question of acceptance does not, and can not arise in this case. The act of 1825 did not propose merely to alter or amend the existing charter of the regents, or to give them another; but to give a new charter to the trustees named. There was nothing therefore for the regents to accept, or to reject. They could neither reject nor accept that which was not offered to them, but attempted to be given to others. The trustees alone had the privilege to reject or accept the act of incorporation that was offered to them—and the regents were put without the pale of the consideration of the legislature. The question then, is not whether the corporation of regents accepted the act of 1825, but whether there was any evidence of its having assented to it, after the organization of the corporation of trustees.

It appears that after the trustees had organized as a corporation, all the members of the faculty of physic, and members of each of the other faculties, were appointed, and accepted situations under them as professors; and that, from that time the corporation of the regents ceased to exert its corporate functions, until the month of September, 1837, and this is considered as evidence to prove the assent of that corporation to the act of 1825.

It is admitted that the acceptance of an act of incorporation by the persons to whom it is offered, or the assent of an exist-

ing corporation to an act for an alteration of its charter, may be inferred from facts demonstrative of such acceptance or assent, without the production of a written instrument or vote of acceptance or assent on the books of the corporation; such as in the first case, the fact of actual organization, which furnishes the presumption of previous acceptance, or may be considered as of itself an act of acceptance, and in the latter, acts and transactions by the corporation or its authorized officers, in pursuance of the proposed alterations of the existing charter, showing the assent of the corporation to such alterations. But the acts, from which the assent of an existing corporation to an alteration of its charter, may and can alone be inferred, must be corporate acts, acts of the corporation, or acts of its authorized officers or agents. It is a vital principle of a corporate body, "that the members are to do no act which may destroy its existence, or injure its privileges:" 3 Desau. 574;¹ 2 Binn. 441.² "Particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation:" 1 Bl. Com. 575; Ang. & Ames on Corp. 107. And "since individual members of a corporation can not, unless authorized, bind the body by express promises, neither can any corporate engagements be implied from their unsanctioned conduct or declarations, as corporations can be bound only by joint and corporate acts, so it is only from such acts, done either by the corporation as a body, or by its authorized agents, that any implication can be made binding it in law:" Id. 130; *Proprietors of the Canal and Bridge Co. v. Gordon*, 1 Pick. 297.³

If no corporate engagement can be implied from the unauthorized conduct or declaration of individual members, if no implication can be made from them, binding in law upon the corporation, in relation to ordinary transactions, on what principle can any inference be drawn from them, going to the very existence of the corporation? In this case, the members of the different faculties who accepted situations under the corporation of the trustees, were not in doing so, acting as the authorized agents of the corporation of regents, nor for anything that appears, under the sanction of any corporate act of assent to the act of 1825, but in disregard of solemn and express corporate acts of dissent, and protestation against the carrying that

1. *Smith v. Smith*.

2. *Commonwealth v. St. Patrick Benevolent Society*; 8 C., 4 Am. Dec. 453.

3. *Proprietors of the Canal Bridge Co. v. Gordon*; 8 C., 11 Am. Dec. 170.

act into operation by the trustees—and the law does not permit any inference of assent to that act by the corporation of regents, to be drawn from such doings—and more particularly, in the face of its clearly-expressed dissent. The most that can be said of it is, that the individual members who accepted places under the trustees, wanted situations which they were afraid of losing, and acted alone under that impulse. Then, what act, corporate or otherwise, was done by the corporation of regents, showing or implying, or legally tending to show its assent to the act for incorporating the trustees, and for its own dissolution? It was in full existence and operation when it was passed, as the record shows. It protested against it after it was passed, and requested the trustees not to carry it into execution. That was no act of assent. A number of its members took situations and acted under the trustees, which it could not prevent; that was no assent by the corporation, but by doing so, and withholding themselves from the discharge of their duties as members of the corporation of regents, though they did not therefore cease to be members, they caused that corporation as a result of the act of 1825, to cease from that time to perform its functions until September, 1837, when the members who had taken situations under the trustees, resigned them, and returned to their duty. During that time it was passive and did nothing, yielding only (as the members who accepted places under the trustees had done) to necessity, and doing no act, from which its assent could be implied, and in the absence of any written instrument or vote of assent, some other act of the corporate body, or of its authorized agent affording the presumption of its assent, should have been produced; and the more particularly, as it is an act not beneficial to the corporation, but one that aims directly at its dissolution, and the presumption, in the absence of any express corporate act to the contrary, would rather be against the assent; seeing, that the last corporate act it did, was a vote of express dissent. It was unwilling submission only to legislative power and influence, and not an adoption of its act.

In *Allen v. McKeen*, 1 Sumn. 276,¹ where a corporation passed a resolution that they acquiesced in an act of the legislature, it was decided not to be an adoption of it, but expressive of mere submission to the legislative will; and that if it could be construed into an approval, it could not give effect to an unconstitutional act. Suppose none of the members of either

1. *Allen v. McKeen*.

of the faculties of the corporation of regents had taken office under the trustees, and they had appointed others and gone into operation; and that the corporation of regents had by no act assented to the act of 1825, but have become wholly inactive, and performed none of their corporate functions; such non-user, if it would have been deemed sufficient cause of forfeiture, on proceedings at law instituted for that purpose, would have been no evidence of assent to the act; but neglect of duty, or a violation of the implied condition of its contract, for which it would have deserved to be dissolved. But the act of 1825 could not have taken the place of judicial proceedings to work a dissolution, and thereby become valid and effectual. Neither non-user nor misuser of corporate franchises, has ever been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared. And how in principle, does this case differ from that which has been put, supposing for a moment, that the conduct of the corporation of regents was such as to have furnished sufficient cause of dissolution upon judicial proceedings? But here it is proposed to give effect to an act of assembly which was passed before any cause of dissolution existed; on the ground that assent by the corporation to that act, arising from a supposed subsequent cause of forfeiture, might be presumed; which can not be against the express dissent of the corporation by a formal vote. An inference of assent by a corporation to an act of assembly, after it has passed, can no more be drawn from a subsequent non-user or misuser of its franchises, than an inference of consent to its being passed, can be drawn from a previous non-user or misuser, which is nowhere pretended; otherwise, there would be no necessity for a judicial ascertainment and declaration of forfeiture, before a new charter can be granted.

Nor can effect be given to this act of assembly by considering the non-user by the corporation of regents, as equivalent to a surrender of its franchises. That can only be done by deed to the state: 1 Salk. 191;¹ Ang. & Ames on Corp. 507; 2 Kent Com. 311 *et al.* And a court is not warranted to presume a surrender of the corporate rights and a dissolution of the corporation, from a mere intentional abandonment of the franchises, unless there be something in the act of incorporation to justify it; as in the case of some of the incorporated companies in New York, under which, for the sake of the remedy and in favor of creditors, the courts of that state have acted upon such

1. *Butler v. Palmer.*

presumption: *Slee v. Bloom*, 19 Johns. 456 [10 Am. Dec. 273]; *Briggs v. Penniman*, 8 Cow. 387 [18 Am. Dec. 454]. But those cases go no further, and recognize the general rule. And if an actual abandonment of the corporate franchises will not warrant the presumption of a virtual surrender of the corporate rights, and a dissolution of the corporation, how can the assent of a corporate body, to an act dissolving the corporation, be inferred or presumed from a mere non-user of the franchises produced by that very act? and that too, in the face of a corporate act of express dissent, remaining unrescinded on the books of the corporation. In no view, therefore, is it believed, that effect can be given to the act of 1825; and whatever may be the condition of the corporation of the regents, the trustees have no authority, as governors of the university, under that act.

But it has been again further contended, that the faculty of physic of the university, became dissolved or extinct on the acceptance by the professors of professorships under the trustees, which it is supposed amounted to resignations of their situations as members of the corporation of the regents; and that by the loss of that integral part the corporation became dissolved, and incompetent to institute or sustain this suit.

The same argument would perhaps equally apply to some of the other faculties; and if either of the faculties was thereby lost, and not restored at the time of bringing the suit, the objection would be fatal to a recovery, whether the corporation was dissolved or only suspended (perhaps more properly the latter), considered as a corporation of integral parts, and not existing as a corporation *de facto*. But their accepting situations under the trustees, did not, in law, amount to resignations of their professorships in the corporation of the regents. "An office in a corporation may be resigned in two ways: by an express agreement between the officer and the corporation, or by such an agreement implied, from his being elected to another office incompatible with it." And "to complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant." Willcock on Munic. Corp., 14 Law Lib. 132, 133, 238, 240; Ang. & Ames on Corp. 254, 255. It is incidental to the right to appoint: *Id.*

By an election to "another incompatible office," is meant another office in the same corporation, as is shown by the sev-

eral examples put in the same books. Here the several members of the corporation of regents, who accepted offices under the trustees, were not elected to other offices in the corporation of regents, but to offices in another corporation; and there is no evidence of any acceptance of their resignations by the corporation of the regents, by any entries in their books, or the elections of other persons to fill their places, treating them as vacant, or in any other manner; nor is there any evidence of their having offered to resign. If individual members of a corporation could resign their situations at pleasure, without the consent of the corporation, it would be in the power of any definite integral part of a corporation composed of integral parts, having the right to fill up vacancies in their own bodies, at any time to dissolve the corporation against its will, and even of a mere majority of any such integral part; and thus a corporation so constituted would be always at the mercy of a minority of its members; and hence the propriety of, and necessity for the rule, that there can be no resignation by a member without the acceptance of it by the corporation; the appointments given by the trustees to members of the corporation of regents, did not make them the less members of that corporation. "Where a new charter which is void, assumes to incorporate a place where there is an existing corporation, and includes the members of the ancient corporation together with new men, if a sufficient number of the ancient corporators, professing to act under the new charter, without any of the new men joining, make a by-law, which they are capable of making under the ancient constitution, their act is referred to their genuine authority, and not to the new charter, and the by-law will be good:" Willcock on Munic. Corp., 14 Law Lib. 57, 103; 1 Salk. 191.¹ Which shows that the taking a situation under a void charter or act of incorporation, is not a resignation of a situation in another existing corporation, and has not that effect, which is just this case. The acceptance of situations under the trustees might have furnished ground to the corporation of regents for removing them, if the power to do so had remained; but that would have been to work a dissolution or suspension of the corporation, if the faculties alone are empowered to fill up the vacancies in their own bodies, as has been supposed.

And thus the corporation of regents was constrained by the act of 1825, and the trustees acting under it to that very in-

1. *Butler v. Palmer.*

activity, which is now charged upon it as a fault or as evidence of its assent to that act. Besides, the nineteenth section of the act of 1812 provides, that the charter shall not be avoided or forfeited by anything done or transacted by the corporation, contrary to the tenor of that act, through oversight, misapprehension, or mistake, either by any court of law, or by the general assembly. The spirit of which solicitude to preserve the corporation, would seem to be, that it should be equally protected against any omission arising from the same cause. And if the corporation could, through oversight or misapprehension, do no corporate act to avoid or forfeit the charter, how could the mistaken course of the individual members of an integral part work that mischief? Or could it have been intended that it should be in their power to dissolve the corporation? Their acceptance, however, of places under the trustees not amounting to resignations of their situations in the corporation of regents, and not having the effect to dissolve or suspend the corporation; if there remained to each faculty when they returned to their duty, which was before the bringing of the suit of those who were members when the trustees took upon themselves the government of the university, a majority of the number of which each should properly be composed, whether residing in Baltimore or not, there was no objection to the competency of the corporation to institute the action. What number did in fact remain does not distinctly appear from the record. But the plaintiff having proved the fact of incorporation, the burden of showing a dissolution of the corporation rested upon the defendant.

These remarks have been made upon the hypothesis, that the corporation is composed of distinct, definite, integral parts. But is that so? The faculties of theology and law are definite classes, consisting of seven members each. But the faculties of physic and of the arts and sciences, are indefinite parts—clearly the faculty of the arts and sciences.

In relation to that faculty, the language of the tenth section of the act is, that “the professors of the arts and sciences (in the plural), and three others, shall form and constitute the faculty of the arts and sciences.” Now, “the professors” may be two, or any larger indefinite number. They can not, however, be fewer than two, and as there must be three more, that faculty when full, would consist of five at least, of which three is a majority—the number that is at least necessary to preserve the faculty. With respect to the faculty of physic, the lan-

guage used is, "that the professors now appointed and authorized in the college of medicine of Maryland, shall constitute the faculty of physic," without specifying any particular number. But they who were at that time, professors in the college of medicine, were merely designated as the persons who should in the first instance compose that faculty, to the exclusion of the president and lecturers. That body, as originally formed, consisted of six members, appointed in the law itself, for the purpose of organizing and carrying the corporation into operation. But the regents of that institution were authorized, from time to time, to appoint professors of the different branches of medicine, without limitation as to number; and seeing how many branches there are, it would seem that the policy of that act was intended to be adopted; leaving the faculty to be composed thereafter, of as many members as from time to time should be thought proper and advisable, according to the condition of the institution; as it was left to the regents of the college of medicine to appoint as many professors, as from time to time might be thought necessary and proper; and seeing, too, that seven is designated as the definite number of members to compose each of the two faculties of divinity and law.

But not so with respect to the faculties of the arts and sciences, and of physic, which might require a larger number; which circumstance would seem further to indicate, that the two faculties of physic and of the arts and sciences, were not intended to be definite classes. Nor is it clear that it is strictly a corporation of integral parts. "The members of the four faculties," in the language of the act, being as a whole, the persons incorporated, and by the eleventh section a majority of the whole number of regents being declared to be a quorum competent to make fundamental regulations for the government and discipline of the university, and to do other corporate business, although every member of any one faculty, and a large portion of another, should be absent from such meeting; whereas, ordinarily, the attendance of a majority of the members of each class, when the corporation is composed of definite integral parts, is necessary to constitute a corporate meeting or assembly. But when this suit was brought, there was in fact a sufficient number of members in each faculty, and whether regularly appointed or not, was not a matter to be inquired of at the trial. No advantage can be taken of any non-user or misuser

on the part of a corporation, by any defendant in any collateral action.

There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one is by *scire facias*, which is the proper process when there is a legally existing body capable of acting, but who have abused their power. The other by information in nature of a *quo warranto*; which properly applies, where there is a corporate body, *de facto* only, but who take upon themselves to act, though from some defect in their constitution or organization, they can not legally exercise their powers. But are entitled to be heard in either case, before they are condemned on proceedings instituted for that purpose, which must be at the instance of the government, and in no other way. For, besides the right of the corporation to a full hearing and judicial judgment of forfeiture, before it can be stripped of its franchises and property, or be considered as dissolved, the government, with which the contract is made, may not wish to enforce a forfeiture, and may if it chooses to do so, waive the breach of any condition of the contract arising out of the charter.

This principle runs through all the books, and has been judicially enforced in a case in the supreme court of New York, strictly analogous to this: *The Trustees of Vernon Society v. Hills*, 6 Cow. 23 [16 Am. Dec. 429]; where it was determined, that though the trustees were at the time of bringing the suit a corporation *de facto* only, not having been appointed in the manner directed by the charter, it could not be taken advantage of by the defendant without showing that proceedings had been instituted by the government, and carried on to a judgment of ouster. Upon the whole, there is nothing to sustain the objection that the plaintiffs were not competent to sue at the time of bringing the action, on the ground that the corporation was dissolved by the loss of an integral part.

It may not be amiss here to observe, that whatever may have been the understanding, it is by no means clear, that the power to fill up vacancies in the different faculties by the appointment of new members of faculty, does not as a necessary incident belong to the regents in their corporate character, and not to the faculties. The power given to the faculties by the eighth section, being to appoint respectively their own "professors and lecturers," who may or may not be selected from their own bodies. And when taken from among themselves, clothed in the two-fold character of members of the faculty so selecting

them, and also of professors and lecturers. May not a faculty consisting of a definite number, be full, and yet have professors and lecturers appointed by itself, not belonging to it as members of the faculty, but rather as officers or agents? And if so, may not the power "to appoint its own professors and lecturers," look alone to the appointment of persons in that character only, and not as members of the faculty, leaving the power to fill up vacancies in the respective faculties to the corporation of regents, by the appointment of new members?

The second and third exceptions, and the second and third prayers, in the fourth exception, being abandoned, it is unnecessary to examine them.

And the only remaining question is, whether this suit can be sustained against the defendant for money received by him as the treasurer of the trustees; which arises on the first prayer in the fourth exception. And the opinion of this court is, that the plaintiffs are entitled to recover from the defendant any money amounting to a sum within the jurisdiction of the court below, remaining in his hands at the time the suit was brought; and which was received by him as the treasurer of the persons claiming under the act of 1825, to be the trustees of the university of Maryland, at any time within three years before the suit was instituted, to which they can show themselves entitled as the regents of the university, or which properly belongs to that institution. But no sum not received within that time, the act of limitations being pleaded and relied upon by the defendant.

Judgment reversed, and procedendo awarded.

Cited on various propositions laid down in the course of the opinion: that there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact which restrains and sets bounds to legislative power: *Cahen v. Jarrett*, 42 Md. 575; *Mayor and Council of Hagerstown v. Sehner*, 37 Id. 191; *Harrison v. Harrison*, 22 Id. 494, where it was said of the act under consideration in the *Regents' case*: "That was an attempt to abolish a private corporation, and invest another with all the franchises and property of the corporation to be abolished. It was a legislative ouster affecting that particular body, in the nature of a sentence rather than a law;" that one is not to be disseised of his freehold or deprived of his property, otherwise than by due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights: *Grove v. Todd*, 41 Id. 641; that a corporation may assent to an alteration or rescission of its charter: *Vis. and Govrs. of St. John's College v. Comptroller and Treasurer*, 23 Id. 640; that as to public corporations, the government has the sole right, as trustee of the public interest, at its own good will and pleasure to inspect, regulate, control, and direct the corporation, its funds and

franchises: *Mayor and Council of Hagerstown v. Schner*, 37 Id. 199; that for a violation of corporate articles direct proceedings only can be taken, and at the instance and in the name of the state: *Lord v. Essex Bldg. Ass'n No. 4*, 37 Id. 327; and that there is nothing inconsistent in declaring one part of the same statute valid and another part void: *Webster v. County Com'rs of Baltimore Co.*, 29 Id. 521. The supreme court of California, in *Bourland v. Hildreth*, 26 Cal. 183, quotes from the language of Chief Justice Buchanan in the principal case in regard to the duty to give the legislature the benefit of a reasonable doubt in respect to the unconstitutionality of an act.

"LAW OF THE LAND" defined and considered in the note to *Bank of the State v. Cooper*, 24 Am. Dec. 517; *Wally's Heirs v. Kennedy*, Id. 511; *Hoke v. Henderson*, 25 Id. 677.

AN ACT WILL NOT BE DECLARED UNCONSTITUTIONAL UNLESS CLEARLY SO: *Hoke v. Henderson*, 25 Am. Dec. 677; *Tate v. Bell*, 26 Id. 221.

UNCONSTITUTIONALITY OF ACTS DIVESTING PRIVATE CORPORATIONS OF POWERS previously granted to them: *Trustees v. Bradbury*, 26 Am. Dec. 515; *Derby T. Co. v. Parks*, 27 Id. 700; *Trustees v. Foy*, 3 Id. 672.

NON-USER OR MISUSER WORKING FORFEITURE OF CORPORATE RIGHTS can not be taken advantage of in a collateral action: *Trustees of Vernon Soc. v. Hills*, 16 Am. Dec. 429; *John v. Farmers and Mechanics' Bank*, 20 Id. 119; *Lehigh Bridge Co. v. Lehigh C. & N. Co.*, 26 Id. 111.

QUO WARRANTO TO SEIZE THE FRANCHISES OF A CORPORATION: See the note to *People v. Rensselaer & S. R. R. Co.*, 30 Am. Dec. 33.

UNION BANK OF GEORGETOWN v. PLANTERS' BANK OF PRINCE GEORGE'S COUNTY.

[9 GILL AND JOHNSON, 439.]

WHERE IT WAS THE USAGE among banks to give a notification of any objection to an account rendered by one to the other, if no objection is made to an account, a reasonable inference arises of its correctness.

THAT THE BANK RECEIVING THE ACCOUNT has suspended makes no difference in such case, it being engaged in settling up its affairs.

THE STATUTE OF LIMITATIONS COMMENCES TO RUN in favor of a suspended bank and against its depositors, not from the time transactions between them terminated, but from the time the suspension was made known to them.

FOR ERROR IN REFUSING TO GIVE AN INSTRUCTION, the appellate court will not grant a reversal, if the appellant was not injured by such refusal.

THE EXCEPTION OF MERCHANTS' ACCOUNTS in the statute of limitations must be pleaded to be taken advantage of.

ASSUMPSIT on the common counts, commenced November 11, 1834. Pleas, *non assumpsit*, *non assumpsit infra tres annos*, and *actio non*, etc. Issue joined. Plaintiffs had extensive dealings with the defendants, consisting of mutual remittances, for collection and credit, which were collected and credited according to the well-known usage among banks. On the sixteenth of

December, 1828, and twenty-second of August, 1829, plaintiffs, in accordance with well-known usage, sent their statement to the defendants of the balance due. It was the custom among banks, on receiving such statements, to examine them, note any discrepancy, and inform the creditor bank thereof. Consequently the plaintiffs contended that, as no objection had been made by the defendants to the statement furnished, a reasonable inference of its correctness ought to be drawn by the jury. An instruction to this effect was refused to be given. Defendants' counsel maintained that the statute of limitations commenced to run from the time all transactions ceased between the banks, and the jury were so instructed. The verdict and judgment being for the defendants, plaintiffs appealed.

C. Cox, for the appellants.

J. Johnson and Pratt, contra.

By Court, ARCHER, J. We think the court were in error in the first bill of exceptions, in not granting the plaintiffs' prayer; that the jury were at liberty to infer from the silence of the defendants, their acquiescence in the correctness of the account rendered by the plaintiffs to the defendants.

These accounts, according to the proof offered in this exception, were rendered to the defendants according to the usage as proved, and as it was further proved, that in case there should be any exception taken to the accounts, such exception or disagreement was, by usage, notified to the plaintiff, and no such notification being given, it was a reasonable inference that the defendant thus receiving the account had acquiesced in its correctness, and the inference was the stronger in this case, as according to the practice and usage of the banks, in case of failure, to notify differences in the respective accounts of the banks, for the bank transmitting its account to infer that it was not objected to, and was admitted to be correct.

The suspension of specie payments in August, 1829, and the declension of banking operations from that time by the defendants, can make no difference in the sufficiency of the evidence, to enable the jury to draw the deduction sought by the plaintiffs, as it was in evidence that the defendants, the Planters' bank, were engaged after the suspension, exclusively in the settlement and adjustment of their business, and the plaintiffs had a right to expect the observance of the usage in regard to the settlement of their mutual accounts, notwithstanding they had suspended banking operations, as they were still engaged,

and exclusively engaged, in the settlement and adjustment of their accounts.

The second bill of exceptions arises on the statute of limitations. The defendants pleaded *non assumpsit*; *non assumpsit infra tres annos*; and *actio non accrevit infra tres annos*. The plaintiffs took issue on the first plea, and issue was joined on the second and third pleas; so that the only questions the jury had to try, or which could legitimately be submitted to them, were, whether the defendants had assumed to pay the claim; whether they had assumed to pay within three years; and whether the action had accrued within three years anterior to the institution of the suit.

There is certainly no evidence in any of the bills of exceptions, of any admission by the defendants, which could prevent the running of the statute.

The claim of the plaintiffs consists of remittances for collection, and of credits, which according to the usage as proved, when collected, were placed to the credit of the bank sending; and to be held as deposits, liable to draft. The defendants, the Planters' bank of Prince George's county, suspended payment on the tenth of August, 1829, and by the letter of the cashier of the defendants, dated twenty-fifth August, 1829, the plaintiffs are informed, that the defendants had resolved to make no distinction between depositors and bill-holders: and it is in evidence, that this suspension of payment was known on twenty-second August, 1829, to the plaintiffs. The time then from which the statute of limitations would commence running, according to the opinion of this court, in *The Farmers and Mechanics' Bank of Georgetown v. The Planters' Bank of Prince George's County*,¹ would be the period when the plaintiffs first had knowledge that the defendants had suspended specie payments: and not the period when the transactions between the parties terminated, as assumed by the court in their directions to the jury.

The dealings between the parties terminated, according to the evidence, on the ninth day of August, 1829. The court were therefore in error in instructing the jury that the cause of action accrued, at least, as early as the jury should find all dealings between the parties terminated, and that limitations commenced to run from such period, instead of dating the commencement of the running of the statute, from the day

1. 8 GILL & J. 449.

when the plaintiffs first had knowledge of the suspension of payment by the defendants.

But the plaintiffs, from the evidence in the cause, were clearly barred of their action, more than three years having elapsed from the date of knowledge by the plaintiffs of the suspension of payment by the defendants: and the plaintiffs are in no manner, therefore, prejudiced by such erroneous direction. For, whether the one period or the other be assumed, as the day from which to date the running of the statute, the plaintiffs are equally barred. Nor do they receive any prejudice by the erroneous refusal of the court to grant their prayer contained in the first exception, for, by the evidence in the cause, their claim was clearly barred by limitations.

If, as is supposed, this were a case of accounts between merchant and merchant, concerning trade and merchandise, to have availed themselves of it, the plaintiffs should have specially replied the fact to the defendants' plea; until this was done, the disclosure in evidence of the fact, could have no effect on the issue which the jury were sworn to try.

Judgment affirmed.

RUNNING OF THE STATUTE OF LIMITATIONS: See the decisions in this series collected in the note to *Wenman v. Mohawk Ins. Co.*, 28 Am. Dec. 467.

ERROR IN COURT BELOW, WHICH DOES NOT PREJUDICE THE PARTY, is not ground for reversal: *Shepherd v. Lanfear*, 25 Am. Dec. 181; *Crocker v. Mann*, 26 Id. 684; *Bosley v. Chesapeake Ins. Co.*, 22 Id. 337; *Brown v. Caldwell*, 13 Id. 660.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

COREY v. COREY.

[19 PICKERING, 29.]

THE FATHER IS ENTITLED TO HIS MINOR SON'S EARNINGS; but may voluntarily relinquish this right, and the son will be entitled to recover the value of his services from his employer, who may not have known of the relinquishment.

IN SUCH CASE, IN ABSENCE OF AN EXPRESS PROMISE by the employer to pay the son, the law will imply one.

ASSUMPSIT for work and labor performed by the plaintiff from the time he was thirteen until he was eighteen years of age, for the defendant, a brother. The father had told the plaintiff that he might work for his brother, and have his earnings; but this understanding not being communicated to the defendant, he contended that the promise to pay for the services, there being no express one, would be implied in favor of the father, and not of the plaintiff. Wilde, J., however, ruled that the law raised a promise in favor of the plaintiff, for whom the jury accordingly brought in a verdict. Motion for a new trial.

Fletcher, for the defendant.

C. P. Curtis and B. R. Curtis, contra.

By Court, **SHAW, C. J.** The general rule of law in this commonwealth, founded on the relations and mutual obligations of the father and his minor children, is, that the father is entitled to the earnings of his minor son. But where the father has voluntarily relinquished his right, and authorized his minor son to employ himself, and to take his own earnings, the son has a right so to contract and the employer will be bound to him. Such an authority on the part of the father, may be shown by

positive proof, or inferred from circumstances; it may be shown by a general permission to go abroad and seek employment, or to engage in a particular service.

Here there was evidence, from the father himself, that before the service commenced, he authorized his son to go into this particular service, and have his earnings. Such being the case, the son became, to a certain extent, independent, with power to act in his own right, and then having performed services, entitling him to compensation, he had a right to recover it in his own name to his own use. It was argued, that the meaning of the father must have been, that when he himself received the earnings, he would pay them to his son. But this seems a forced construction. It is much more probable, that when he told him he might go into his brother's employment and have his earnings, his meaning was, that he should himself take his earnings from his brother.

Then it is stated in the report, that there was no evidence tending to show, that the defendant knew that the father had told the plaintiff, he might have his earnings. But the court are of opinion, that it was not necessary for the plaintiff to prove, that the defendant had that notice at the time of the engagement. Where one deals with another acting under an authority, it is sufficient to prove the existence of the authority afterwards. If one person makes a payment to another, as agent of a third, without evidence of authority at the time, it will be sufficient to render the act valid, to show that in point of fact, the agent was so authorized.

It was contended, that in the absence of all proof of express contract, the law would presume the promise, to the father and not to the son. In absence of all proof of any authority from the father to the son to contract in his own right, this might be so. It is founded on the principle, that by law the father is entitled to the earnings, and the law implies a promise to pay, according to the right, for the sake of the legal remedy by assumpsit. But when it is shown, that the father had relinquished his right *pro tanto*, and authorized the son to contract for his employment and take his earnings, then upon the same general reason, the law implies a promise to pay the son, according to his right. It was in reference to this state of the evidence, obviously, that the jury were instructed that if no contract, that is, no express contract, between the plaintiff and defendant were shown, the plaintiff might recover upon an implied promise for his services. That is, there being evidence

to show, that in the particular case, the son had a right, derived from his father, to take his earnings, he might recover upon an implied promise conformably to that right.

This brings it to the ordinary case of young men under twenty-one coming from the country seeking employment. The very offer of service implies, that if they have fathers, they have their consent thus to seek employment, but no formal evidence of this is usually produced. The employer pays the servant. The employer afterwards is able to show, that the father had authorized the son thus to seek employment and take his wages. Supposing the employer refuses to pay the wages, and the servant is compelled to sue. May he not, upon proof of the same fact of authority, given by his father, sue in his own name? The ground is, that in point of fact, *quoad hoc* the son acts in his own right, and being for his benefit, the contract will be supported.

Judgment on the verdict.

EARNINGS OF INFANT CHILD.—If a minor makes a contract for his services on his own account, with the knowledge and without the objection of his father, there is an implied assent that the minor shall have his earnings: *Whiting v. Earle*, 15 Am. Dec. 207. And the agreement between the father and son that the latter may have his earnings, is irrevocable: *Morse v. Welton*, 16 Id. 73 and note.

ALGER v. THACHER.

[19 PICKERING, 51.]

A BOND IS IN RESTRAINT OF TRADE AND VOID if it excludes the obligor from engaging in the trade of iron founder everywhere and for all time.

DEBT on a bond by the plaintiff, who had purchased three hundred and thirty-seven shares of stock in the South Boston iron company, from the defendant who had given the bond in question, and which he now contended was void as being in restraint of trade. The clause relied upon as creating the illegality in the bond is recited in the opinion. Demurrer to the declaration.

C. G. Loring and F. C. Loring, for the defendant.

Parsons and Stearns, contra.

By Court, **MORTON, J.** The point for our decision is the validity of the bond declared on. The oyer spreads the instrument on the record and virtually makes it a part of the declara-

tion. And the demurrer presents distinctly and in the best possible form, the question whether upon its face it appears to be a legal and valid obligation: 1 Chit. Pl. 416; 1 Saund. 10;¹ *Dorr v. Fenno*, 12 Pick. 521.

The objection to the bond arises from the following clause, by which the defendant binds himself never hereafter "in his own name or in the name of another, to conduct, carry on, use, or employ the art, trade, or occupation of an iron founder or caster, or be concerned, interested, employed, or engaged, directly or indirectly, in any manner whatsoever, or under any pretense whatsoever, in the business of founding or casting of iron." This stipulation is too clear and explicit to be misunderstood. It will admit of but one construction. It purports to exclude the defendant, everywhere and at all times, from a participation in the trade or business referred to. Such a contract, the defendant contends, is against sound policy and contrary to established principles of law.

Among the most ancient rules of the common law we find it laid down, that bonds in restraint of trade are void. As early as the second year of Henry V., A. D. 1415, we find by the year books, that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true, the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary.

For two hundred years, the rule continued unchanged and without exceptions. Then an attempt was made to qualify it, by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a general and a limited restraint of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I., A. D. 1621, *Broad v. Jollyffe*, Cro. Jac. 596, when it was holden, that a contract not to use a certain trade in a particular place, was an exception to the general rule, and not void. And in the great and leading case on this subject, *Mitchel v. Reynolds*, reported in Lucas, 27, 85, 130; Fortes. 296, and 1 P. Wms. 181, the distinction between contracts under seal, and not under seal, was finally exploded, and the distinction between limited and general restraints fully established.

1. *Jevens v. Harridge*.

Ever since that decision, contracts in restraint of trade generally, have been held to be void; while those limited as to time, or place, or persons, have been regarded as valid, and duly enforced. Whether these exceptions to the general rule were wise, and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer.

This doctrine extends to all branches of trade and all kinds of business. The efforts of the plaintiff's counsel to limit it to handicraft trades, or to found it on the English system of apprenticeship, though enriched by deep learning and indefatigable research, have proved unavailing. In England, the law of apprenticeship and the law against the restraint of trade, may have a connection. But we think it very clear that they do not, in any measure, depend upon each other. That the law under consideration has been adopted and practiced upon in this country and in this state, is abundantly evident from the cases cited from our own reports. It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on great principles of public policy, and carries out our constitutional prohibition of monopolies and exclusive privileges.

The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations.

1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void.

In the latest case which we have examined, *Homer v. Ashford*, 3 Bing. 319,¹ the English law is thus laid down by Chief Justice

1. 3 Bing. 322.

Best: "The law will not permit any one to restrain a person from doing what the public and his own interest require that he should do. Any deed therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void; because no good reason can be imagined for any person imposing such a restraint on himself. But it may often happen, that individual interest and general convenience may render engagements not to carry on trade or to act in a profession in a particular place, proper." As to what shall be deemed a reasonable limitation, there is, and from the nature of things can be, no definite rule. It must depend on the circumstances of each particular case, and the good sense and sound discretion of the tribunal which may have the case to settle. It would be out of place now to investigate it. There is no limitation as to time, place, or person. The restraint is perpetual and universal. And if the doctrine be in force in this country and can apply to any case, we think it must include the one now before us. In addition to the numerous authorities cited by the counsel, we have examined and referred to the following: *Clarke v. Comer*,¹ Cas. temp. Hardw. 53; *Chesman v. Nainby*, 2 Ld. Raym. 1456; S. C., 3 Bro. P. C. 349; *Freemantle v. Co. of Silk Throwsters*, 1 Lev. 229; *Cuddon v. Eastwick*, Salk. 193; *Harrison v. Godman*, 1 Burr. 12; *Peirce v. Bartram*,² Cowp. 269; *Gunmakers of London v. Fell*, Willes, 384; *Harrison v. Gardner*, 2 Madd. 198; *Shackle v. Baker*, 14 Ves. 468; *Morris v. Coleman*, 18 Id. 468;³ *Crutterell v. Lye*,⁴ 17 Id. 336.

Judgment for the defendant on the demurrer.

CONTRACTS IN RESTRAINT OF TRADE.—The principal case is cited in *Crosby v. Harrison*, 116 Mass. 114, and in *Taylor v. Blanchard*, 13 Allen, 373, although in these decisions contracts differing in their effect from that here discussed were considered. In *Wright v. Ryder*, 36 Cal. 342, 357, *Alger v. Thacher* is pronounced to be a leading case on the point which it settles, and its authority is recognized in *Perkins v. Clay*, 54 N. H. 519; *Long v. Towel*, 42 Mo. 549; *Whitney v. Slayton*, 40 Me. 230. The distinctions observed in determining a contract to be in restraint of trade, and for that reason void, will be found laid down in *Pierce v. Fuller*, 5 Am. Dec. 102; *Pike v. Thomas*, 7 Id. 741, and the note thereto, where the general subject is considered, and in *Palmer v. Stebbins*, 15 Id. 204.

1. *Clarke v. Comer*.
2. *Pierce v. Bartram*.

3. *Morris v. Coleman*, 18 Ves. 437.
4. *Cruttwell v. Lye*.

STETSON v. FAXON.

[19 PICKERING, 147.]

A CITY MAY LAY OUT HIGHWAYS; public highways may be proved by prescription or by dedication within its limits, and for a nuisance thereon an indictment will lie.

A BUILDING OR A FENCE ON A PUBLIC HIGHWAY, when not in existence for sixty years, may be treated as a nuisance.

A SALE OF LAND BY A CITY is made subject to the public easement of right of passage over the highways laid out thereon.

FOR A NUISANCE COMMON TO THE PUBLIC, indictment must be resorted to; where an individual receives special injury, an action for damages will also lie.

IN AN ACTION FOR A NUISANCE, allegations of special damage are essential; plaintiff must show that he has sustained particular injury different in character from that common to all the citizens.

ERECTING A BUILDING OUT INTO THE STREET, whereby plaintiff's warehouse is obstructed from view, free communication therewith cut off, causing tenants to desert it, and necessitating reducing rents, is a sufficient statement of a nuisance occasioning particular injury, for which an action will lie.

ACTION on the case. Plaintiff owned a warehouse facing southerly on a way which had been used and recognized by the city of Boston as a street for more than sixty years, although no record was in evidence of the laying out of such way. The city laid out a new street to the south of this ancient one, running in front of plaintiff's warehouse, and thereafter sold to the defendant, who also had a warehouse to the east of the plaintiff's, and separated therefrom by a narrow alley and facing the ancient way, the fee in this ancient way in front of his warehouse to the north line of the new street. The defendant then proceeded to erect a new warehouse on his original lot, and covering that portion of the ancient way bought by him. This new structure extended beyond the plaintiff's building thirty-six feet, and the special injury alleged to be thereby occasioned was the obscuring and darkening the plaintiff's warehouse, the obstructing the free communication therewith which formerly existed, the blocking the alley with building materials so as to deprive the plaintiff wholly of the use thereof, the loss of tenants, expenses of repairs and alterations to induce tenants to continue in the occupancy thereof, and the reduction of rent occasioned by impairing the value of the warehouse. Verdict for the plaintiff for four thousand and ten dollars and twelve cents. Motion for a new trial.

J. Pickering and C. P. Curtis, for the defendant.

J. Mason and C. G. Loring, *contra*.

By Court, PUTNAM, J. The city is in some respects to be regarded as a county; it has authority to lay out and to discontinue public highways as well as town ways within its limits; and public highways may be proved by prescription, as well as by dedication, within those limits, as they may be in any other part of the commonwealth. And individuals may be indicted for public nuisances upon a public street or town way, as well as upon a common public highway. So the difference between the counts in that respect does not affect the questions now to be considered.

These questions are, whether the instructions to the jury were correct.

And first, we are satisfied the evidence was sufficient to prove that the place whereon the defendant's building was erected was a public highway, by prescription, and that the evidence does not show that it has been legally discontinued. No record proceedings of the court of general sessions, or of the city government, have been produced, to show such discontinuance. And no length of time short of sixty years would be sufficient to justify the continuance of a fence or building on a public highway, but such a building might be presented and removed as a public nuisance: Stat. 1786, c. 67, sec. 7. [Reduced to forty years by Rev. Stat., c. 24, sec. 61.]

The sale of the land by the city to the defendant would pass the estate if the city owned it, but it would be subject to the public easement, and a building erected thereon would be a public nuisance notwithstanding the deed from the city. The king himself can not give license to any to commit a nuisance: Vin., Nuisance, F. The making and paving North Market street, by the side of the old street, and the other acts of the city, do not amount to a discontinuance of the ancient highway. Besides, a party may be greatly injured by the discontinuance, as well as by the laying out of a town or public way, and he should have notice and an opportunity to substantiate his claim for damages on that account: Stat. 1816, c. 90, sec. 1.

We are all satisfied that the case comes to the single point, whether or not the plaintiff can maintain this action for special damages sustained by the public nuisance upon a highway. In other words, whether the evidence produced is sufficient to prove that the plaintiff has received particular damage from this

nuisance, which was not common to all the people. If it were common to all, then the rule of law is clear, that the remedy against the party making the nuisance should be by indictment. On the other hand, though the party may be indicted, yet if an individual receives a special damage, he may maintain his action for it against the wrong-doer.

In the case in Year Book, 27 Hen. VIII., pl. 10, p. 27, the plaintiff declared that he used to have a way from his house to his close by the highway, "royal chemin," to carry and recarry, etc., and the defendant stopped the highway, so that the plaintiff could not go in that part of it to his close, to his injury and damage. There it was argued by Baldwin, C. J., that the party should be punished only by presentment in the leet for the common nuisance, and that if one could maintain an action, another might, and so the party might be punished a hundred times for the same cause. On the other hand, it was said by Fitzherbert, J., that the man who makes the nuisance is punishable in the leet, and not by action, unless it be where a man has greater hurt or incommmodity than every other man had, but that he who had greater incommmodity or hurt should have his action to recover for the special hurt; and the following illustration is put: Where one makes a ditch across the highway, and I am traveling in the night and with my horse fall into the ditch, and so have great damage and inconvenience, I may have an action against him who made the ditch. And so in the principal case, the plaintiff having more "commodity" in the highway than another had, when it was stopped he had greater damage, because he had no other way to his close. But if he had not greater damage than another, then he should not have any action.

And the law is so laid down by Lord Coke. To maintain this action the plaintiff must prove that the damage he has sustained "is not common to others," to use the expression of Lord Coke: Co. Lit. 56 a. So in 5 Co. 73, *Williams' case*, the same law is stated. "But if any particular person afterwards, by the nuisance done, has more particular damage than any other, there for that particular injury he shall have a particular action on the case."

The general rule seems clear enough, but the difficulty arises from its application to the particular case.

In *Paine v. Patrich*,¹ Carth. 194, it was said by Holt, C. J., that if a highway be so stopped that a man is delayed a little

1. *Paine v. Partrick*.

while on his journey, by reason whereof he is damnified, or some important affair neglected, that is not such a special damage for which an action of the case will lie; but that the damage ought to be direct and not consequential, as the loss of his horse, or some corporal hurt in falling into a trench in a highway. In *Hubert v. Groves*, 1 Esp. 148, the plaintiff declared that he was possessed of a messuage and had a way out of the same through and over a public highway, to carry all things necessary in the coal and timber business, which the defendant obstructed by earth and rubbish; and thereby prevented the plaintiff from carrying on his business as a coal and timber merchant in so advantageous a manner as he had a right to do, but he was obliged to carry the coals by a circuitous route. Lord Kenyon ordered the plaintiffs to be called, being of opinion that this was not such a special damage as would entitle the plaintiff to maintain the action. The authority of this case has been greatly shaken, however, as will be seen hereafter.

In *Maynell v. Saltmarsh*, 1 Keb. 847, the plaintiff brought his action against the defendant for erecting posts in a highway through which the plaintiff passed to and from his close, and alleged that his corn was corrupted and spoiled in consequence of the obstruction; and it was held that that was a sufficient special damage to support the plaintiff's action.

In *Chichester v. Lethbridge*, Willes, 71, where the defendant obstructed the highway by a ditch or gate across the road, by means of which the plaintiff was obliged to go a longer and more difficult way to and from his close, and the defendant opposed the plaintiff in attempting to remove the nuisance, it was held that the action well lay for special damages. And Willes, C. J., cited the case of *Hart v. Basset*, T. Jones, 156, where one had a right to tithes and a direct way to carry them through a highway to his barn, but who was obliged, in consequence of the stoppage of the highway, to carry them by a longer and more difficult way, recovered for the extra labor and pains which he was forced to take with his cattle and servants by reason of the obstruction.

In Willes, in a note, may be found a reference to the case of *Iveson v. Moore*, reported in Salk. 15; in 1 Ld. Raym. 486; and in 12 Mod. 262, case 474. There the plaintiff declared that he had a colliery near a highway by which he used to carry his coals, and that the defendants stopped the way, and so the plaintiff lost the opportunity of selling his coals, which were greatly deteriorated. The court of king's bench were divided

in opinion, and the cause was argued before all the judges of England, who agreed with Turton, J., and Gould, J., that the action lay. They said, among other things, that the plaintiff did suffer a special damage more than the rest of the king's subjects, and particularly in respect to his trade, and we particularly refer to the opinion of Gould, J., and the cases cited by him, which are not by us now cited more at large. In *Baker v. Moore*, cited by Gould, J., in 1 Ld. Raym. 491, the plaintiff sued the defendant for making an obstruction across a highway, in consequence of which the plaintiff's tenants left his houses and he lost the profits of them. It was objected for the defendant, that the damage was not special enough, but the court were of a different opinion. The judgment was arrested, however, upon another ground, viz., that the plaintiff did not show that he was possessed of any houses in which there were tenants, and if he had not any houses, then he could not be damnified.

In *Rose et al. v. Miles*, 4 Mau. & Sel. 101, the defendant obstructed a public navigable creek by mooring his barge across the same, and prevented the plaintiff from navigating his loaded barges, *per quod* he was obliged to carry his goods overland at great expense; and the action was supported. In *Greasly v. Codling et al.*, 2 Bing. 263, the plaintiff was in the habit of passing upon and down a highway with coals, and was detained four hours, and could not carry as many loads in a day by the circuitous route which he was obliged to go in consequence of the defendants' obstruction of the highway; and the action was maintained.

The case of *The Mayor and Burgesses of Lyme Regis v. Henley, original plaintiff*, 1 Bing. (N. R.)¹ 222, has a strong bearing upon the case at bar. The facts (very shortly) were, that the king granted to the corporation the pier-quay of Lyme Regis, and they were to repair the buildings, banks, sea-shore, and other mounds, etc., between the borough and the sea, at their own cost. They accepted the charter. The plaintiff had land near the sea-shore, which was overflowed in consequence of the wrongful omission of the corporation to repair the banks, sea-shore, etc.; and he brought his action for the special injury. The cause was decided in the house of lords in 1834. It was held, that an indictment would lie against the corporation for the breach of their duty which arose under the charter. Park, J., who delivered the opinion of the judges, said: "It is

1. 1 Bing. New Cas.

clear and undoubted law, that wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage." The judgment for the original plaintiff was affirmed.

We propose to cite only two other cases, one decided in Baltimore county court, before Stephenson Archer, chief judge of the sixth judicial district of Maryland: *Baron et al. v. The Mayor and City Council of Baltimore*, 2 Am. Jur. 203; the other, a late English decision: *Wilkes v. Hungerford Market Co.*, 2 Bing. (N. R.)¹ 281.

The plaintiffs in the former case owned a wharf in the harbor of Baltimore, and the city authorities of Baltimore diverted certain streams of water from their natural channels to a point near the plaintiffs' wharf, and thereby caused a great deposit of sand and earth to be carried down, and so to lessen the depth of water at the wharf, and materially to impair the rents and value of the wharf.

It was contended, among other things, for the defendants, that if any wrong was done in filling up the navigable water near to the wharf to some extent, as the plaintiffs set forth, it was a public nuisance, and that the defendants were answerable only upon an indictment, and not in a civil action by the plaintiffs. The opinion of Archer, C. J., is very clear and able. It is founded on the immutable principles of justice and sound constitutional law. "If (said he) the exercise of the power [by the defendants] was wanton or lawless and improvident, every one admits their responsibility." But the case was not defended upon that ground. On the contrary, it was contended by the defendants, that they were a public corporation, acting within the scope of their authority, upon advice, with due care and circumspection. The opinion of Archer, C. J., proceeds upon that ground, that it was a measure which was necessary and beneficial to the city; but it was held, that they should not carry it into effect without compensating the individuals whose property was thereby sacrificed. The right of the plaintiffs to pass and repass with their vessels in the navigable waters, was recognized. They had been deprived of the privilege by the act of the defendants. They had as perfect a right to the profits growing out of the depth of the navigable water which flowed up to their wharf, as to the wharf itself. But only vessels of smaller size could approach the wharf after the deposit had been made, and which the defendants had

1. 2 Bing. New Cas.

caused. Their right to wharfage was greatly impaired, and for that special injury they were entitled to maintain their action. The defendants, said the chief judge, "are trustees of public interests, for their own benefit, and ought to answer as an individual to the person at whose expense they are benefited." The jury in that case returned a verdict for the plaintiffs for four thousand seven hundred dollars.

The case of *Wilkes v. Hungerford Market Company*, was decided in November, 1835. The plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered in his business in consequence of passengers having been diverted from the thoroughfare by an unauthorized obstruction across it for an unreasonable time. The allegation of the plaintiff was, that by means of the obstruction he was prevented from carrying on his trade and business in so large, ample, and beneficial a manner as he otherwise might and would have done, and that he had lost and been deprived, during the time that the obstruction existed, of divers great gains and profits which might and otherwise would have arisen and accrued to him from carrying on the trade and business of a bookseller in his messuage and premises. The plaintiff proved the allegations in his writ, and obtained a verdict. And on the hearing of the motion for a nonsuit, it was contended, that the act of the defendants constituted a public nuisance, for which an indictment, but not a civil action, might lie. The whole court decided otherwise. And the cases from the year books up to that time were examined. Lord Kenyon's ruling in the case of *Hubert v. Groves* was examined. Tindal, C. J., suggested a distinction between that case and the case then under consideration, which seemed not satisfactory even to himself, for he concluded by remarking, that if it were not sufficient, he must yield to the greater authority of other decisions. Park, J., thought it not entitled to the respect which is commonly rendered to the opinions of Lord Kenyon. In short, the authority of that case was greatly shaken, if it was not overruled.

The rule of the law, which is applicable to the case at bar, has been in full force for many centuries. We know that extreme cases may be put, which makes it difficult to draw the line between substantial and imaginary damages. Thus, suppose a ditch to be cut across Washington street at the Roxbury line; shall every holder of real estates and of shops in that street, between Cornhill and Roxbury, maintain an action for special damages to their estates for that nuisance? The proposition

would seem to be absurd. But it would not follow, that because some owners of shops, who lived a mile from the obstruction, might not have special damages, those who lived near to it might not. Let those who suffer, have their actions. The question of damages may be safely intrusted to the jury. We mean to give no countenance for suits *de minimis*. But suppose that twenty men, in the course of one night, should fall into that ditch and receive injury, could it be maintained that each of them might not severally recover special damages, according to the extent of the actual injury received by each?

The people at large are supposed to be injured, merely because they can not pursue a particular track; which is an inconvenience felt by thousands, to be redressed by a prosecution in the name of the commonwealth. They suffer no actual particular injury to their trade or estates, and a prosecution on the behalf of the public furnishes the appropriate remedy. But individuals who, either in their persons or estates, suffer great damage, which may be proved to proceed and follow necessarily from the public nuisance, surely stand upon different ground. And each may have his action and recover for the particular damage, according to the evidence.

Take the case cited from 1 Bing. N. R. 222. The plaintiff's lands were inundated by means of the nuisance. The inhabitants of the borough who had no lands in that situation, could only justly complain of a common annoyance. But all the individuals who held lands in severalty, might severally maintain their actions for their several special damages. So in the case cited from 2 Id. 281, which has a strong resemblance to the case at bar. The plaintiff there was deprived of the profits of his bookstore, and his estate was greatly prejudiced by the public nuisance. But the community had no estate, and no bookstores in that situation. They only suffered such inconvenience from the obstruction of the highway as was common to all the people. Let them indict the wrong-doer if they will. So in the case cited from the American Jurist. It was the plaintiffs whose wharf estate was greatly deteriorated by the public nuisance. The inhabitants of Baltimore were rather benefited than injured by the public improvement, by which the plaintiff's interest was destroyed.

So in the case at bar, the citizens of Boston who want a mere right of passage from Market square to the sea, may pass through North Market street as well as they could through the old way which was obstructed. They have no lands and ware-

houses to be destroyed or greatly injured; they have no loss of rents from the desertion of tenants. They at most are obliged to travel in a new street near to the old one, and probably do not desire to have the old one re-opened. At most they could complain only of what is technically a common nuisance, by which they experience only an inconvenience common to all the citizens. But what to them is at most a mere common inconvenience, is a thing which, in respect to the plaintiff, essentially impairs the value of his estate.

We agree that the plaintiff must set forth a special damage. It will not be sufficient for him to state merely that the defendant obstructed the highway in such a manner as that he could not pass through it: *Fineux v. Hovenden*, Cro. Eliz. 664. He must fail unless he goes on and states that he has sustained a particular injury, different in its character from that which is common to all the citizens.

We will now very briefly recur to the facts alleged and proved in the case at bar. The plaintiff averred his title to the warehouses and real estate, and that by means of the obstructions made by the defendant upon the highway, his warehouses have been greatly obscured and injured, and access thereto prevented from and along the part of the highway so obstructed; that thereby the free communication which the plaintiff and other persons frequently resorting to his warehouses formerly enjoyed, has been greatly diminished and hindered; that he has suffered great damage from the nuisance, by reason of his warehouses and lands having been deserted by his tenants, and left vacant and unoccupied by the frequent changes and removals of his tenants and occupiers, and that he has been obliged to reduce his rents, etc.

Now upon the authority of the adjudged cases before referred to, we are all of opinion, that these are sufficient special injuries, peculiar to the plaintiff, and not common to all the citizens, for which the plaintiff may maintain his action, notwithstanding the defendant may be liable to answer upon an indictment for the public nuisance. The facts alleged have been proved to the satisfaction of the jury; and they have assessed damages for the plaintiff in the sum of four thousand and ten dollars and twelve cents.

No motion is made to set aside the verdict on the ground that the damages were excessive. There was no motive to give too much; for if the city are to indemnify the defendant upon their covenant of warranty contained in their deed to him, the

damages must fall upon the jurors themselves in due proportion. And the long-established rule of law which we enforce, is not, we trust, to check the progress of public improvement. Let the city take from individuals all that is necessary, convenient, and becoming this great and flourishing capital, but let compensation go hand in hand with the public benefit.

The opinion of the whole court is, that the plaintiff is entitled to have his judgment upon the verdict.

PRIVATE ACTION FOR PUBLIC NUISANCE.—That an individual who suffers particular injury by reason of a public nuisance may have an action therefor, is a well-settled principle of law: *Burrows v. Pixley*, 1 Am. Dec. 56 and note; S. C., 1 Root, 362; *Hughes v. Heiser*, 2 Am. Dec. 459; S. C., 1 Binn. 463; *Lansing v. Smith*, 21 Am. Dec. 89; S. C., 4 Wend. 9; *Baker v. Boston*, 22 Am. Dec. 421; S. C., 12 Pick. 184; *Abbott v. Mills*, 23 Am. Dec. 222; S. C., 3 Vt. 521; *Mills v. Hall*, 24 Am. Dec. 160; S. C., 9 Wend. 315; *Rung v. Shoneberger*, 26 Am. Dec. 95 in note; S. C., 2 Watts, 23; *Blanc v. Klumpke*, 29 Cal. 159; *Yolo Co. v. Sacramento*, 36 Id. 195; *Aram v. Schallenberger*, 41 Id. 449; *Jarvis v. Santa Clara V. R. R. Co.*, 52 Id. 438; *Coburn v. Ames*, Id. 385; *Bigley v. Nunan*, 53 Id. 403; *Payne v. McKinley*, 54 Id. 532; *O'Brien v. Norwich and Worcester R. R. Co.*, 17 Conn. 372; *Seeley v. Bishop*, 19 Id. 128; *Coast Line R. R. Co. v. Cohen*, 50 Ga. 451; *Macdonald v. English*, 85 Ill. 232; *Prince v. McCoy*, 40 Iowa, 533; *Ewell v. Greenwood*, 26 Id. 377; *Venard v. Cross*, 8 Kan. 248; *Brown v. Watson*, 47 Me. 161; *Dudley v. Kennedy*, 63 Id. 465; *Thayer v. Boston*, *post*; *Wesson v. Washburn Iron Co.*, 13 Allen, 101; *Houck v. Wachter*, 34 Md. 265; S. C., 6 Am. Rep. 332; *Harrison v. Sterett*, 4 Har. & M. 540; *Shaubut v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 502; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Id. 136; *Green v. Lake*, 54 Miss. 540; *Runyon v. Bordine*, 14 N. J. L. (2 Green) 472; *Lansing v. Smith*, 21 Am. Dec. 89 and note; *Mills v. Hall*, 24 Id. 160 and note; *Milhau v. Sharp*, 27 N. Y.; *Francis v. Schoellkopf*, 53 Id. 152; *Milarkey v. Foster*, 6 Or. 378; S. C., 25 Am. Rep. 531 and note; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Hughes v. Heiser*, *supra*; *Clark v. Peckham*, 10 R. I. 35; *Baxter v. Winooski T. Co.*, 22 Vt. 114; *Hatch v. Vt. Central R. R. Co.*, 28 Id. 142; *Barnes v. Racine*, 4 Wis. 454; *Williams v. Smith*, 22 Id. 594; *Greene v. Minnemacher*, 36 Id. 50; *Dunn v. Stone*, 2 Car. L. Repos. 261; *Gordon v. Baxter*, 74 N. C. 470.

In many of these cases, damages such as would support a private action for a public nuisance are required to be "peculiar and special." But this phrase doubtless means the same as "particular" used in the above statement. The difficulty arises when it is sought to determine what given injury is "particular" or "special and peculiar" within the intent of the rule. One of the earliest, if not the first recorded case, states the general doctrine and gives the reason in such a manner, as to leave no further expression of the principle necessary, and to furnish a plain criterion for its application. It is admitted that even in England, where this case was decided, it has not been followed in spirit, and certainly not in many of the courts of this country. If adopted, however, it would put an end to the diversity of opinion which prevails upon this subject, and would insure a reasonable determination of the rights of private individuals with respect to public nuisance. The case referred to is that reported under the title of *Williams' case*, 5 Co. 73. In the course of the opinion this language is used: "A man shall not have an action on the case

for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason every one might have an action, and then he would be punished one hundred times for one and the same cause. But if any particular person afterwards, by the nuisance done, has more particular damage than any other, then for that particular injury he shall have a particular action on the case. And for common nuisances which are equal to all the king's liege people, the common law has appointed other courts for the correction and reforming of them."

This decision affirms the existence of a private right of action where the party suffers "more particular damage done" than other people. This is the sound distinction. If a single individual be permitted in any case to sue at law for the damage occasioned him, it ought to be in such instances as those suggested, that is, wherever he receives damage in which the public do not share. In the well-established cases of special damage, where by reason of a public nuisance, such as stagnant water, offensive employments, illness is occasioned in the plaintiff's family, or his house is rendered uninhabitable, the injury which he suffers is exactly that which the public at large suffer, only in a different degree. It is because the stagnant waters or noisome trades are likely to cause sickness and render dwellings uninhabitable that they are deemed public nuisances, and for continuing them an indictment would lie. But just so soon as any person finds that his house is growing uninhabitable, or his family are being made sick, he can have a remedy therefor. And each person so situated may bring an action. So far as the public are concerned, the offensive odors constituting the nuisance injure each member thereof, but because the injury is not great enough to be felt appreciably by each one, they must all join through their common prosecutor by indictment. In the one case the damage is direct and substantial; in the other it is not. In the one case damage is incurred wherein the public do not share, and is greater than that experienced by the public; in the other, all suffer alike and each equally imperceptibly. Nuisances of this particular character have been before the courts in *Hamilton v. Columbus*, 52 Ga. 435; *Francis v. Schoellkopf*, 53 N. Y. 152; *Greene v. Winnemacher*, 36 Wis. 50; *Mills v. Hall*, 24 Am. Dec. 160.

In nuisances of this kind there is, perhaps, no diversity of opinion, the "particular" character of the injury being so manifest. But in the consideration of another class of nuisances, obstructions of highways, some of the courts lose sight of the nature of the injury to the public and the private individual respectively, and lay down principles which would deprive one of his action for actual damage occasioned by stagnant waters or noisome occupations. It is even said that the injury to the individual must not be "greater in degree merely" than that to the general public, but "must be an injury different in kind from that sustained by the public:" *Bigely v. Nunan*, 53 Cal. 403; *Payne v. McKinley*, 54 Id. 532; *Arum v. Schallenberger*, 41 Id. 449. To illustrate, in the last case, where a fence was about to be built across a road, although the only means of access to plaintiff's premises would thereby be cut off, yet as this inconvenience was greater to him than to the general public, "simply from the more frequent occasion" he might have to travel the road, and was "of the same nature as would occur to any other person who might have occasion to use it," he was thought not to suffer particular or special damage. It is perfectly apparent that the erection of such a fence would be a nuisance to the public, to those who had no call to travel the road as well as to those who had; but to say that those who had no other means of exit from their premises suffered no injury peculiar to themselves

and different from the citizens at large, is to take away the right of private action for public nuisance. To require damage of a different kind from that inflicted upon the public to support an individual action, is to hold that such an action will not lie for a public nuisance. The injury occasioned determines whether a given thing is a nuisance, and of what class; if it is to the public, then the thing is a public nuisance; if not, then it is a private nuisance. It is well known that a public nuisance may also be a private one: *Grigsby v. Clear Lake Water Co.*, 40 Cal. 390; but if, as stated in the decision from California, above cited, to enable a person to sue for a common nuisance, he is required to suffer injury of a different kind from the public, then it is not the common nuisance at all which he sues for, but an entirely different one. If it must be an injury, a nuisance of another kind, it can not be the same nuisance of which the public complain. And the time-honored rule first herein stated, that a private action would lie for particular injury arising from a common nuisance, would, under this construction, be abrogated.

But these cases are opposed to the current of the authorities. To have suffered in a greater degree than the public is to have received special and peculiar damage according to the best-considered and greatest number of the cases. Instances of obstructions of a highway where such has been declared to be the law are: *Milarkey v. Foster*, 6 Or. 378; S. C., 25 Am. Rep. 531 and note; *Venard v. Cross*, 8 Kan. 248; *Barnes v. Racine*, 4 Wis. 454; *Williams v. Smith*, 22 Id. 594; *Ewell v. Greenwood*, 26 Iowa, 377; *Brown v. Watson*, 47 Me. 161; *Dudley v. Kennedy*, 63 Id. 465; *Gordon v. Baxter*, 74 N. C. 470; *Clark v. Peckham*, 10 R. I. 35; *contra*, *Seeley v. Bishop*, 19 Conn. 128, 135. It is an injury in which the public do not share; as said in *Dudley v. Kennedy*, *supra*, the damages sustained are "over and above those inflicted on the general public." The injury is plainly distinguishable from that suffered by the public at large, as explained in Cooley on Torts, 618. Therefore redress at law is and ought to be given. The objection that according to the same reasoning every one so injured could bring an action for the nuisance, is of little avail. It is no defense, as Chancellor Walworth remarks, in *Lansing v. Smith*, 4 Wend. 9; S. C., 21 Am. Dec. 9, "to say that he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all." The supreme court of Kansas, in *Venard v. Cross*, 8 Kan. 248, a case similar to *Aram v. Schallenberger*, 41 Cal. 449, distinctly said that such an obstruction, as was not thought by the California court to create a "particular" injury, "is a particular injury to the plaintiff, one differing not merely in degree, but also in kind, from that suffered by the community in general." In fact, it is difficult to reconcile the doctrine of *Aram v. Schallenberger* with the principle embodied in a question asked by that court in *Blanc v. Klumpke*, 29 Cal. 159: if by a public nuisance the plaintiff "is obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with and to some extent prevented, can it be said he suffers only in common with the public at large?"

Upon another question arising out of the obstruction of a public way, the courts are not so harmonious as upon the effect of a complete cutting off of one's ingress and egress. The question is, does a person suffer special, particular injury when he is obliged to, and can take a more circuitous route? The same principle which has herein been contended for, that the injury is special, particularly when not shared in by the people at large, applies to this state of facts as well as to that of a complete cutting off of the passage. But courts seem loath to make the application, because, doubtless, of the multiplicity of suits it would occasion, and, as some urge, of the consequential

nature of the damage. For consequential damage, the English courts refuse an individual action: *Benjamin v. Storr*, L. R. (9 C. P.) 400; S. C., 10 Moak, 231; a distinction, however, repudiated in this country: *Lansing v. Smith*, 21 Am. Dec. 89; S. C., 4 Wend. 9; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Baxter v. Winoski T. Co.*, 22 Vt. 114. But the mere necessity to take a longer road is pronounced by several courts to be the very same injury that every citizen feels by reason of the obstruction, and to impose on no particular person any damage distinguishable from that which the public have suffered: *Shaubut v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 502; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Id. 136; *Houck v. Wachter*, 34 Md. 265; S. C., 6 Am. Rep. 332; *McGowan v. Whitesides*, 31 Ind. 235. Other courts have preferred to look at the actual facts of a case, and where it is apparent that by reason of an obstruction in a highway, and the consequent necessity of taking a circuitous route, a person has in fact experienced a loss in which the public do not share, have entertained his action for the loss: *Milarkey v. Foster*, 6 Or. 375; 25 Am. Rep. 531; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Brown v. Watson*, 47 Me. 161; *Ewell v. Greenwood*, 26 Iowa, 377; *Williams v. Smith*, 22 Wis. 594. The decisions thus far considered involve the question of "special damage" other than that occasioned by physical injury from the existence of a common nuisance. As regards injury of this character, there is no doubt it is uniformly pronounced to give a good cause of action: *Duggert v. Schenck*, 23 Wend. 446; 3 Bl. Com. 220. Here is plainly an injury in which the public do not share.

THOMSON v. WINCHESTER.

[19 PICKERING, 214.]

UNLESS THE INVENTOR HAS PATENTED HIS MEDICINES, he has no cause of action against another who prepares the same kind of medicines and calls them by the same generic name, if he does not offer and sell them as the preparation of the inventor.

IDEM.—But if another puts up an inferior article and sells it as the plaintiff's preparation, it is a fraud upon him, for which he may recover without proving special damage.

ACTION on the case, for putting up and selling, as though prepared by the plaintiff, certain inferior medicines, calling them by the name by which the inventions of the plaintiff were known, thereby greatly injuring the plaintiff. Verdict for the defendant, to be set aside and a new trial granted if the rulings of the court were erroneous.

Sprague and Peabody, for the plaintiff.

Parsons, Stearns, and C. Sumner, contra.

SHAW, C. J. The court are of opinion, that if the defendant made and sold medicines, calling them "Thomsonian medicines," and sold them, or placed them in the hands of others to sell, as and for the medicines made and prepared

by the plaintiff, so that persons purchasing the same supposed and believed that they were purchasing the medicines made and prepared by the plaintiff, it was a fraud upon the plaintiff, and an injury to his rights, for which the law will presume some damage: *Sykes v. Sykes*, 3 Barn. & Cress. 541; S. C., 5 Dow. & Ry. 292. Such a case, therefore, being proved, the plaintiff will be entitled to recover nominal damage, at least, and something more, if he can make it appear to the satisfaction of a jury, that he has sustained more than nominal damage. We have reason to believe, that it was so ruled at the trial, and that there was an error in drawing up the report, representing the opinion given upon one point, as in fact given upon another; but, being bound to take the report as it is, we think the verdict must be set aside and a new trial granted.

The court are also of opinion that the rule laid down was correct, that without obtaining a patent, the plaintiff had no exclusive right or privilege to compound or vend the medicines called "Thomsonian," although he was the original inventor, and that he had no more right than the plaintiff to make and vend these medicines, or to call them Thomsonian, if this term had acquired a generic meaning, descriptive of a general kind, quality, and class of medicines, as, for instance, James' powders, or Turlington's balsam, and if they were not sold to consumers, or consigned or sold to others, to be sold to consumers, as and for medicines made and prepared by the plaintiff.

If the defendant made and sold medicines, calling them Thomsonian as a generic term designating their general character, but did not offer and sell them, nor consign them to others to sell, as and for medicines made and prepared by the plaintiff, and if he made and compounded such medicines of bad materials, with inadequate skill, by means whereof the credit and character of all Thomsonian medicines were brought into disrepute, the plaintiff can recover no damage. If he, in fact, suffers loss from that cause, it is *damnum absque injuria*. It shows no infringement of any right of the plaintiff. The loss he would sustain is common to him and every other druggist, who may show that the whole craft suffer loss, when the public are imposed on by any one of their number, who, for the sake of gain, may compound medicines of cheap and inferior materials, and thereby bring that species of medicine, or all species of medicine, into disrepute, and deter many persons from taking medicine, and greatly diminish the sale. The

right to make and to sell is common to all, if no deceit is practiced by one, in falsely assuming the name and credit of another. In such case, if the plaintiff makes a superior article, and desires to secure to himself the benefit arising from the superior character of his medicines, he must take care so to designate and identify them as to save himself and his customers from mistake and imposition.

The consequence is, that imposition, falsehood, and fraud on the part of the defendant, in passing off his own medicines as those of the plaintiff, would be a ground of action, but that adulteration of his own medicines, without such imposition and fraud, will afford the plaintiff no cause of action.

New trial granted.

Cited, as to the right to use a generic name employed as a designation for a particular preparation, in *Taylor v. Carpenter*, 2 Woodb. & M. 10, 13; and on page 21 of the same case, as to the measure of damages. The same decision, on page 15, refers to *Thomson v. Carpenter*, on the right of an alien to sue in the state and federal courts.

ADAMS v. NICHOLS.

[19 PICKERING, 275.]

ACCIDENT OR INEVITABLE NECESSITY will not excuse non-performance of a contract, wherein there is no exception of such accidents. Thus, a man who agrees to build a house on another's land is not released from his obligation, by the destruction of the house by fire after it had been nearly completed.

A CONTRACT IN WRITING WILL NOT BE DEEMED TO BE WAIVED by executory parol agreements.

DEBT on a penal bond, conditioned for the erection of a dwelling-house for plaintiff upon his land. After the house had been raised and principally covered, and materials prepared for finishing it, it was destroyed by fire from causes unknown to either party. The defendant also insisted that he was released from liability on the original contract, by reason of parol agreement in regard to the substitution of a different quality of board for the covering of the house; and by reason of certain additions and alterations in the contract. Verdict for the plaintiff, pursuant to the judge's instructions, subject to the opinion of the whole court.

Byington and Porter, for the defendants.

Bishop and Sumner, contra.

By Court, MORTON, J. The defendants do not pretend that they have executed their contract to build a house for the plaintiff, but contend that the facts disclosed furnish a legal excuse for not doing it.

The general rule on this subject is laid down and well explained, in a note to *Walton v. Waterhouse*, 2 Wms. Saund. 422. It is, that where the law imposes a duty upon any one, inevitable accident may excuse the non-performance; for the law will not require of a party what, without any fault of his, he becomes unable to perform. But where the party by his agreement voluntarily assumes or creates a duty or charge upon himself, he shall be bound by his contract, and the non-performance of it will not be excused by accident or inevitable necessity; for if he desired any such exception, he should have provided for it in his contract. This rule is recognized in *Bullock v. Dommitt*, 6 T. R. 650, and by this court in *Fowler v. Bott*, 6 Mass. 63, and *Phillips v. Stevens*, 16 Id. 238; and is nowhere called in question. Indeed the defendants' counsel expressly admit it; but contend that there are exceptions to it, and that this case comes within them. To show that there are exceptions they rely on the case of *Sprague v. Stevens*, decided in this court in 1825, and *Seymour v. Brown*, 19 Johns. 44. But these cases do not support the defendants' view. They were both deemed to be cases of bailment; in which there being no negligence on the part of the bailee, the loss must fall on the bailor. The first was clearly a case of this description; and the other was assumed to be (whether correctly or not, may well be doubted), and on that assumption, was decided according to well-settled principles: 2 Kent Com. 463.

It is not very material to consider whose property the house was before its destruction. The principal defendant had contracted to build and finish a house on the plaintiff's land. After the conflagration he might have proceeded under the contract, and if he had completed a house according to the terms of his agreement, the plaintiff would have been bound to perform his part of the stipulations. So, if, in any stage of its progress, he had seen fit to remove any part of the materials, and substitute others, if they were according to the terms of the contract, the plaintiff could not complain. They must therefore be deemed to be at his risk. And if he had not intended to incur this risk, he should otherwise have stipulated, in his agreement. Had the article to be made been a chattel, as a coach or a vessel, it is extremely clear that the materials, in the first place, and the

article itself, in every stage of its manufacture, from its inception to its completion, would have been at the risk of the builder. Now it is not easy to perceive how it can make any difference in the construction or operation of the contract, that the thing manufactured was to be attached to the freehold.

The two cases cited from our own reports, are much stronger than the one under consideration. In *Fowler v. Bott*, 6 Mass. 63, it was holden, that the covenant in a lease to pay rent, was operative and could be enforced, although the property leased consisted of buildings which were destroyed at any time during the term. And in *Phillips v. Stevens*, 16 Id. 238, it was decided that the covenant in a lease of buildings, to keep them in repair, and at the expiration of the term, to surrender them in good condition, is imperative upon the lessee in all cases, and will bind him to rebuild in case the buildings are destroyed by fire or otherwise, without his fault. In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts.

We are, on the whole, clearly of opinion, that the unfortunate casualty, which occurred in this case, did not relieve the defendant Nichols from his obligation to perform the contract which he had deliberately entered into.

Nor can we perceive any evidence that the parties to the written agreement intended to waive it. It can not be doubted, that if Nichols, after the fire, had proceeded under the contract and completed the house according to its provisions, the plaintiff would have been bound to execute his part of the contract. The alterations, or rather additions to the house, which were made by agreement of the parties, have no tendency to prove a waiver of the contract; much less the agreement for further alterations. It is not necessary to examine the question, whether a written contract may be waived by parol. But executory parol agreements to vary or modify the terms of a written contract, are not operative to produce that effect. Executed parol agreements stand on a different ground.

In this contract the parties, after the destruction of the house, were bound by the original stipulations, and the plaintiff could not require the additional height to the wings, or the additional covering of the house, and the defendant Nichols could not be compelled to make them.

The original contract remaining in force, and there being no legal excuse for not executing it, the defendants are liable for the damage which the plaintiff has sustained by the non-performance of it. The bond in suit being for the faithful performance of the contract, is clearly forfeited by the breach; and the plaintiff must have judgment against both the defendants, the surety as well as the principal. There must however be a hearing in equity.

Judgment on the verdict.

A WRITTEN CONTRACT WILL NOT BE SUPERSEDED by an executory parol agreement; a proposition upon which the principal case is followed in *Hunt v. Barfield*, 19 Ala. 120; *Walker v. Greene*, 22 Id. 680; *Haynes v. Fuller*, 40 Me. 170. Parol enlargement of the time of performance of a written contract is valid, if the contract itself would be valid if made by parol: *Blood v. Goodrich*, 24 Am. Dec. 122 and note; *Deshazo v. Lewis*, Id. 769; *Baker v. Whitesides*, 12 Id. 168 and note; *Solomons v. Jones*, 5 Id. 538; *Keating v. Price*, 1 Id. 92.

INEVITABLE ACCIDENT AGAINST WHICH A PARTY MIGHT HAVE STIPULATED in his contract, but omitted to do so, will not excuse non-performance thereof: *Tompkins v. Dudley*, 25 N. Y. 274; *Wells v. Calnan*, 107 Mass. 517; *District Township v. Smith*, 39 Iowa, 11; *Bacon v. Cobb*, 45 Ill. 53; *Schwartz v. Saunders*, 46 Id. 22; *School District No. 1 v. Dauchy*, 25 Conn. 538; *Cassady v. Clarke*, 7 Ark. 131, in each of which the principal case is cited and followed. Where leased premises were destroyed by fire, it was not considered to be an excuse for the non-payment of rent: *Hallett v. Wylie*, 3 Am. Dec. 457. And a covenant to repair is binding, although the leased mill may have been carried away by the ice: *Ross v. Overton*, 2 Id. 552 and note. A contrary ruling was made in *Pollard v. Shauffer*, 1 Id. 239, where the covenant to repair and deliver up the premises in good order was excused by reason of the destruction complained of having been committed by a public enemy. This ruling, though law in Pennsylvania, is opposed to the weight of the authority, as appears from the foregoing decisions and from the note to the case last cited.

NON-PERFORMANCE OF A CONTRACT, when occasioned by the act of God, or of the law, or of the obligee, will be excused: *People v. Manning*, 18 Am. Dec. 451 and note.

McCLALLEN v. ADAMS.

[19 PICKERING, 333.]

A PHYSICIAN UNDER WHOSE CARE a man places his wife, some distance from his own residence, is presumed to have authority to do all such acts, and adopt such course of treatment and operations as are in his opinion necessary, without previously notifying the husband of an intended operation; nor need he prove to the satisfaction of the jury that the operation was necessary, or that it would be dangerous to the wife to wait until her husband was notified.

ASSUMPSIT on an account. One item, thirty dollars, for am-

putating the breast of plaintiff's wife, was sought to be stricken out. The defendant had taken his wife from Colerain, their place of residence, to Nassau, a distance of sixty-five miles, and placed her under the care of the plaintiff, a surgeon of good reputation. The wife had some trouble with scrofulous humor in her breast, but it was not a cancer nor cancerous. After she had been in Nassau ten weeks, the plaintiff, without having sent any notice to the defendant, amputated his wife's breast. She died in about a week after. No communications had passed between the plaintiff and the defendant, or between the latter and his wife during her stay at Nassau until a day or two before her death. The jury were instructed: "That as it did not appear that the wife had a cancer or cancerous humor when the defendant put her under the care of the plaintiff, the plaintiff was not authorized to perform the operation so as to charge the defendant with payment, without proving to the reasonable satisfaction of the jury that the operation was necessary and proper under the circumstances, and proving further, that before he performed the operation, he gave notice to the defendant, or that it would have been dangerous to the wife to wait before he performed the operation till notice could be given to the defendant; and as no evidence of the kind was given or offered, the jury would not be authorized to allow this item." Verdict for the plaintiff less the item. Plaintiff excepted.

R. E. Newcomb and H. G. Newcomb, for the plaintiff.

Wells and Alvord, contra.

SHAW, C. J. The court are of opinion, upon the facts appearing by the bill of exceptions, that the defendant, by placing his wife under the care of the plaintiff, whom he knew, at a distance from his own residence, for medical and surgical treatment, for a dangerous disease, impliedly requested him to do all such acts, and adopt such course of treatment and operations, as in his judgment would be most likely to effect her ultimate cure and recovery, with the assent of the wife, and therefore that the operation in question was within the scope of the authority given him. They are also of opinion that the assent of the wife, to the operation, was to be presumed from the circumstances. Although it might have been an act of prudence in the plaintiff to give the defendant notice of the situation of the wife, and of his intention to perform a dangerous operation, yet we think he might safely trust to the judgment of the wife, to give her husband notice from time to time of her

situation and intentions, and that it was not necessary, in point of law, for the plaintiff to give such notice, or have any new request, in order to enable him to recover a reasonable compensation for his services. If the defendant intended to show that the operation was unnecessary or improper, under the circumstances, or that it was unskillfully or carelessly performed, the burden of proof was on him. The performance of this operation being within the scope of the plaintiff's authority, if in his judgment necessary or expedient, and that it was so, is to be presumed from the fact, it was not necessary for him to prove to the satisfaction of the jury, that it was necessary and proper, under the circumstances, or that before he performed it he gave notice to the defendant, or that it would be dangerous to the wife to wait before he performed it, till notice could be given to the defendant.

The court of common pleas, before which the cause was tried, having expressed an opinion and directed the jury, that these proofs were necessary to enable the plaintiff to recover a compensation for his professional services, this court is of opinion, that that direction was wrong, that the exceptions be allowed, the verdict set aside, and a new trial had, and that the cause be remitted to the court of common pleas for trial.

PETERS v. WESTBOROUGH.

[19 PICKERING, 364.]

AN AGREEMENT CAPABLE OF BEING PERFORMED within a year, is not within the statute of frauds, although it be not actually performed till after that time.

AN AGREEMENT TO BE PERFORMED UPON A CONTINGENCY which may arise during a year, is not within the statute.

AN AGREEMENT WHICH BY ITS TERMS IS NOT TO BE PERFORMED WITHIN A YEAR, is within the statute, although it might be partly performed within the year.

A PAROL AGREEMENT TO SUPPORT a person for a number of years, is not within the statute, for had the person died within the year, the contract would have been performed.

ASSUMPSIT for the support of Catharine Ladds, from March 2, 1835, to May 31, 1835, brought against the inhabitants of Westborough. Catharine came into plaintiff's family in March, 1834, her father living in an adjoining town, and on March 2, 1835, she then being sick, plaintiff notified one of the overseers of the poor of her illness, and requested that the town should

support her, but no action was taken by them. The defendants offered in evidence, against the objection of the plaintiff, a parol agreement between Catharine's father and the plaintiff, from which it appeared that the plaintiff agreed to take Catharine into his family and employment for one month, on trial, to return her if she did not give satisfaction; otherwise to keep and support her until she was eighteen years of age, she being then eleven or twelve years of age; and defendants then proved that after the month's trial, plaintiff expressed himself as satisfied with her, and never offered to return her to her father. The judge below ruled, that as the contract was by parol, the plaintiff could rescind at any time, and that after notice to the overseers, he ceased to be liable for Catharine's support. The evidence was rejected, and a verdict found for the plaintiff. Defendants excepted.

Washburn, for the defendants.

Merrick, contra.

WILDE, J. This case depends on the question, whether the plaintiff was not, by his contract, as it was offered to be proved by the defendants, bound to support the pauper, for the expenses of whose support the defendants are charged; and we are of opinion that he was so bound by his contract with the pauper's father. This was clearly a valid contract, unless being by parol, it was void by the statute of frauds, as an agreement not to be performed within the space of one year from the making thereof: Stat. 1788, c. 16, sec. 1. But this clause of the statute extends only to such agreements as, by the express appointment of the parties, are not to be performed within a year. If an agreement be capable of being performed within a year from the making thereof, it is not within the statute, although it be not actually performed till after that period: 1 Com. on Con. 86. On this construction of the statute it was decided, in an anonymous case in 1 Salk. 280, that a parol promise to pay so much money upon the return of a certain ship, was not within the statute, although the ship happened not to return within two years after the promise was made; for that, by possibility, the ship might have returned within a year. So, in the case of *Peter v. Compton*, Skin. 353, it was decided, that a promise to pay money to the plaintiff on the day of his marriage, was not within the statute, though the marriage did not happen within a year. And it was held by a majority of the judges, that where an agreement is to be per-

formed upon a contingency, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year.

This construction of the statute is fully confirmed by the case of *Fenton v. Emblers*, 3 Burr. 1278. In that case the defendant's testator had promised the plaintiff, that if she would become his housekeeper, he would pay her wages after the rate of six pounds per annum, and give her, by his last will and testament, a legacy or annuity of sixteen pounds by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his housekeeper, and continued so for more than three years. And the contract, though by parol, was held to be valid and not within the statute. Mr. Justice Dennison declaring his opinion to be (in which opinion the other judges coincided), that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed, that a contingency was not within it, nor any case that depended on a contingency, and that it did not extend to cases where the thing might be performed within the year.

But if it appears clearly, that an agreement is not to be performed within a year, and that such is the understanding of the parties, it is within the statute of frauds, although it might be partly performed within that period. Such was the decision in *Boydell v. Drummond*, 11 East, 142. But the performance of the agreement in that case did not depend on the life of either party, or any other contingency. The defendant had agreed to take and pay for a series of large prints from some of the scenes in Shakspeare's plays. The whole were to be published in numbers; and one number, at least, was to be published annually after the delivery of the first. The whole scope of the undertaking shows, as Lord Ellenborough remarks, that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year.

From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them,

that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this we think is the clear meaning of the statute.

In the present case, the performance of the plaintiff's agreement with the child's father, depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year.

Judgment of the court of common pleas reversed, and a new trial granted.

WHERE A CONTRACT MAY BY ITS TERMS BE PERFORMED WITHIN THE YEAR it is not void by the statute of frauds, although in some contingencies it may extend beyond the year: *Roberts v. Rockbottom Company*, 7 Metc. 48; *Lyon v. King*, 11 Id. 412, especially relying upon the principal case: *Troubridge v. Wetherbee*, 11 Allen, 363; *Doyle v. Dixon*, 97 Mass. 211.

HOBBS v. LOWELL.

[19 PICKERING, 405.]

HIGHWAY MAY BE DEDICATED in Massachusetts by consent of the owner and acceptance by the public.

DEDICATION MAY BE PRESUMED from circumstances from which the consent of the owner of the soil may be inferred.

TO RENDER THE PUBLIC LIABLE FOR INJURY ON DEDICATED HIGHWAY, whether formal acceptance by public necessary, *quære*.

ACCEPTANCE BY PUBLIC ARISES where the municipal authorities do not punish the obstruction of an old highway, and the people use the new one.

ACTION on the case for injuries occasioned by plaintiff's falling at night-time, with a horse and chaise, into an excavation in Merrimac street, Lowell. The questions presented appear from the opinion. Nonsuit ordered, subject to the opinion of the court.

Lawrence and Hopkinson, for the plaintiff.

Smith and Mann, contra.

By Court, SHAW, C. J. This cause was submitted to the decision of the court, without argument; it has been a considerable time under consideration, partly because it involves a question of great public importance, and partly because the court

have not been able to come to a result with entire unanimity. The question is, whether the street, in which the accident happened, has become a highway by dedication, so that the town of Lowell, and now the city of Lowell, is bound to keep it in repair, liable to an indictment for not keeping it in repair, and responsible to individuals, on the statute, for damage sustained by the want of such repair.

In the case of *Hinckley v. Hastings*, 2 Pick. 162, the court, in giving their opinion, after recognizing the principle of dedication of a highway, as admitted and practiced on in England, add, "but it is not known that in this commonwealth, a way has ever been made by dedication." We do not consider that this was a decision of any point in that case, because there was no evidence by which an express or implied dedication of the soil, by the owners, to the public, could be proved. It was the case of a highway, laid out by a public body, the selectmen of Boston, having competent authority to do the act, but the record of which was so imperfect and ambiguous, as to render the act void for uncertainty. The defendant also relied upon a use and enjoyment for six years, which is clearly not sufficient to establish a public easement, by prescription or presumed grant, by adverse use. The only other evidence was an executory agreement between a vendor and purchaser of real estate, that a street should be laid out over the land of the vendor, adjoining the land sold; this manifestly implied that a street should be laid out, in due legal form, by the selectmen having competent authority by law for that purpose, and so it seems to have been understood and acted upon, by all the parties interested.

This case raises the question, whether, under any possible circumstances, a highway can be established and recognized in this commonwealth by dedication, that is, by an appropriation by the owner of the soil, to the use of the public for a highway, and the adoption thereof by the public; because it is scarcely possible to imagine a case of dedication more clearly and fully proved, than in the present case. The owner of the soil laid out and fitted this section of road for public travel; the old highway, for which it was substituted, was not only afterwards disused, *de facto*, but was obstructed, so as to render it physically impassable. The town of Chelmsford, whose duty it was to keep this section of the old road in repair, if they did not intend to adopt the new one as a substitute, instituted no prosecution against those who obstructed it, but, on the contrary,

the surveyors of highways, the selectmen, and the corporation itself, acquiesced in the change, until the territory was set off into a new town. The way in question was an open highway in actual use, when the town, by the act of incorporation, became *de facto* liable to support and repair all highways within its limits, and they have taken no measures to re-establish the old road from that time to the present. This highway was so in actual use by the public, from 1822, when it was opened, until 1828, when the accident occurred. The act of the owners of the soil in appropriating the land to public use as a highway, is as distinct and unequivocal as could possibly be, without an instrument in writing; and the actual use of the highway by the public and the acquiescence by all persons in authority, whose assent could be considered requisite, are as clearly proved as tacit acquiescence ever can be.

The question then recurs, whether there can be a highway by such dedication. The principle seems to have been long recognized as a settled principle of the common law. In *Lade v. Shepherd*, 2 Stra. 1004, it was held that by such dedication, the public became entitled to the use of the land for all purposes of passage, although the owner did not thereby become divested of the absolute right of property in the soil. But the same is true of the right of every proprietor, whose land is appropriated to the public for a highway, in however formal and solemn a manner such appropriation is made. In many recent cases, the principle has been recognized as a settled principle of the common law, although many cases have occurred, in which questions have been discussed, as to what acts constitute such a dedication. The great question has been, whether particular acts have been such as clearly to indicate the intent of the owner of the soil to appropriate it to public use.

In a case where a passage had been opened through private grounds, from one point in a public street, to another point in the same, though circuitous and narrow, yet being to some extent useful, and having been long used by the public, it was held to be a highway by dedication: *Rex v. Lloyd*, Camp. 260;¹ *Rugby Charity v. Merryweather*, 11 East, 376. And such dedication may be presumed from circumstances, from which the assent of the owner of the soil may be inferred: *Stafford v. Coyney*, 7 Barn. & Cress. 257; *Rex v. Barr*, 4 Camp. 16; *Jarvis v. Dean*, 3 Bing. 447. The general principle was well stated by Chamber, J., in *Woodyer v. Hadden*, 5 Taunt. 137. This case

1. 1 Camp. 260.

was much discussed; there was a difference of opinion, whether the facts in the case established a dedication, though all agreed in the general principle. The learned judge says: "No particular time is necessary for evidence of a dedication; it is not, like a grant, presumed from length of time: if the act of dedication be unequivocal, it may take place immediately: for instance, if a man builds a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway."

The general doctrine seems to result from a few well-settled principles of the common law. The case supposes a highway *de facto* in actual use by the public, and who shall say that it is not a highway to all purposes? Not the owner, for he has assented to it, and is in effect estopped by his own act *in pais*. Not the public, for they have the use and benefit of it.

Since the case of *Hinckley v. Hastings*, 2 Pick. 162, the case of *Cincinnati v. White*, 6 Pet. 431, has been decided by the supreme court of the United States. This distinctly recognizes the doctrine of dedication, as having a competent foundation in the principles of the common law as adopted and practiced upon in this country for the establishment of a highway; indeed, its fitness and utility are recognized as peculiarly applicable to this country, where, in case of most of the cities, thickly-settled towns, and villages, so rapidly springing up, the right of the public to the streets and highways rests almost invariably upon this foundation.

The only serious difficulty in the application of this doctrine, arises from the question, whether the assent of the public is necessary to the complete dedication of a highway; and if it is, how that assent is to be manifested or withheld. The objection is, that it would be a great hardship upon towns if an individual could lay open a way upon his own land, throw it open to the public, then oblige the town to charge themselves with the maintenance and repairs of it. In a very recent case in England, *Rex v. Leake*, 5 Barn. & Adol. 469, it was held, that to constitute a highway by dedication, the assent of the parish was not necessary; but when a highway had been in fact used by the public for a series of years, the parish were indictable for not repairing it. It is manifest, however, that there is very little analogy between the character, powers, and duties of parishes in England and those of towns in this commonwealth. Almost the only point of resemblance is, that they are respectively bound to repair all highways within their limits, where other

provision is not made by law for the purpose. The great point of difference is, that in this commonwealth, towns have the power in a certain course of proceedings, to lay out town ways, which are in effect public highways, within their limits; they are also recognized as parties in all proceedings for establishing new highways, for the support of which they are to be responsible.

But we consider that the questions whether the assent of the public is necessary to an effectual dedication, and how it is to be given or withheld, do not arise in the present case, and the court gives no opinion upon them; they must be considered as open for consideration whenever they occur. In the present case, the town of Chelmsford, the town and city of Lowell, the county and the commonwealth, by their respective town and city officers, grand juries, and public prosecutors, by forbearing to proceed against those who have stopped up the old highway, and substituted the new one for it, have respectively expressed their assent to this dedication; and it is too late now for the city to say this road is not a public highway. The opinion of a majority of the court is, that the nonsuit ought to be taken off, and a trial had on the merits.

MORTON, J., dissenting, based his opinion on the proposition that the doctrine of dedication, as prevailing at the common law in England, had not been adopted in this commonwealth: *Hinckley v. Hastings*, 2 Pick. 162. He argued that from the earliest history of the country, this commonwealth had by statute declared the manner in which town ways and common highways could be created and maintained; that to permit individuals, by opening passage-ways across their land, to charge the municipal authorities with their support, would render the statutory enactments nugatory, and establish ways where the interests of individuals and not of the public would be subserved. His honor stated, against the introduction of the system of dedication in this commonwealth, that although a prescriptive use might establish a public highway, the towns have no power to give any assent to a dedication of a way, such authority to bind the public not being conferred upon them: *Stetson v. Kempton*, 13 Mass. 272 [7 Am. Dec. 145].

It is evident that the dissenting opinion of Judge Morton set forth views more satisfactory to the people at large than those expressed in the opinion of the court. The following quotation from *Hayden v. Inhabitants of Attleborough*, 7 Gray, 338, 343 (1856), furnishes an insight into the subsequent history of this case. Referring to the Stat. 1846, c. 203, sec. 1, Judge Metcalf

says: "It was passed for the purpose of altering the law as it was held in *Hobbs v. Lowell*, 19 Pick. 405, and preventing thenceforth the establishment of ways by dedication of land therefor, and the assent thereto by towns. The decision in that case was that such dedication and assent constituted a legal way which a town was bound to keep in repair, and was liable in damages for an injury received by reason of a defect therein, in the same manner and to the same extent as if the way had been established in the statute mode. Since the statute of 1846, ways can not be legally established by such dedication and assent so as to render towns liable to repair them. Yet by the third section of that statute, towns are liable to damages for injuries caused by defects in such ways, if they do not close up the entrances to them, or give other sufficient notice that they are dangerous."

In *Thayer v. Boston*, *post*, the various principles concerning dedication in *Hobbs v. Lowell* are affirmed; and so, also, in *Valentine v. Boston*, 22 Pick. 80; *Commonwealth v. Fisk*, 8 Metc. 243, which were decided prior to the Stat. 1846. In *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 340; *Morse v. Stocker*, 1 Allen, 154, the modifications in the law as laid down by the principal case, produced by the statute of 1846, are adverted to, and the authority of the principal case, where not affected by this act, is recognized in *Tyler v. Sturdy*, 108 Mass. 196, in respect to a public footway; and in *Hayden v. Stone*, 112 Id. 346, in respect to a highway created by dedication prior to the act.

THE SUBJECT OF DEDICATION IS DISCUSSED at length in the note to *State v. Trask*, 27 Am. Dec. 559. Other cases in this series involving the question are *Watertown v. Cowen*, Id. 80, and *Brown v. Manning*, Id. 255.

FROST v. SPAULDING.

[19 PICKERING, 445.]

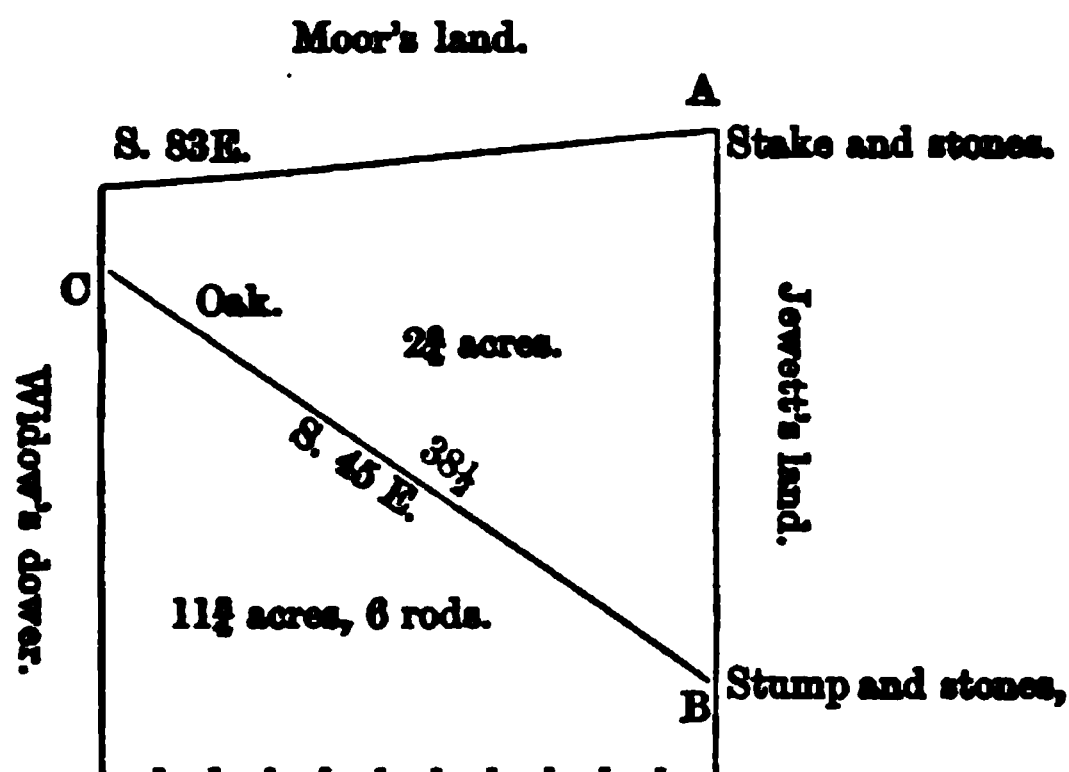
IN THE INTERPRETATION OF DEEDS AND INSTRUMENTS in writing, courts are bound to effectuate the intention of the parties, if it can be done consistently with the rules of law.

MONUMENTS CONTROL COURSES AND DISTANCES, where there is a conflict, in determining the land conveyed by a deed.

IDEM.—In a deed the land was bounded by a line running northerly to M.'s land, "thence south-easterly by said M.'s land thirty-eight and one half rods to a stump and stones;" by laying out the land between the two monuments, it would have a gore between it and M.'s land, and it was held that this gore did not pass by the deed.

TRESPASS, *q. c. f.* The plaintiff claimed under one Levi Frost, deriving title under his father Solomon, deceased. The defendant claimed under Morse, a purchaser at a sale of the land by Solomon's administrator. The description of the land in the administrator's deed contained these words: "a certain parcel of land, lying in the southerly part of Groton aforesaid, containing ten acres of woodland, be the same more or less, bounded thus, viz.: beginning at a stake and stones on the line of widow Sarah Frost's dower or thirds; thence northerly

by said thirds to black oak tree marked, being the corner of the dower or thirds lately set off to said Sarah, widow of said Solomon; thence easterly by said thirds to a maple tree marked; thence northerly by said thirds until it comes to land of Joseph Moor, esquire; thence south-easterly by said Moor's land, thirty-eight rods and one half, to a stump and stones; thence southerly by land of Aaron Jewett twenty-nine rods to a stake and stones; thence westerly to the bound first mentioned." The *locus* was a gore between the line running south-easterly, it not going by Moor's land, as stated in the deed, and marked A B C in the accompanying diagram. Verdict for the plaintiff, by consent, subject to the opinion of the court.



Farley, for the plaintiff.

Hoar, Lawrence, and Joel Adams, for the defendant.

By Court, WILDE, J. In the interpretation of deeds and other instruments in writing, courts are bound to effectuate the intention of the parties, if it can be done consistently with the rules of law. When, however, such intention is doubtful, other rules of construction are to be observed, in order to ascertain with reasonable certainty, if it can be done, the true intention of the parties; one of which rules is, that where, in a deed of conveyance, the land conveyed is described by reference to monuments, and by courses and distances, which do not correspond with each other, the monuments are to control the courses and distances, they being the surest indication of the intention of the parties as to the extent and limits of the land conveyed. Without some such rule, grants might be void for uncertainty; which are never to be so adjudged, if by any reasonable construction it may be avoided.

Applying these rules of construction to this case, we are of opinion, that the *locus in quo* did not pass by the deed of Rufus Frost, the administrator of Solomon Frost, to Samuel Morse, under which the defendant claims title and attempts to justify the supposed trespass. By the first part of the description of the land conveyed by this deed, it is bounded by land set off to Sarah Frost, the widow of Solomon Frost, as her dower or thirds, running thereby several courses up to the land of Joseph Moor. There is no monument referred to in the deed on Moor's line, but it was proved that immediately after the sale of the land by the administrator, the parties went on the premises, and the bounds marked C and B on the plan annexed to the report were pointed out as the north-west and north-east corner of the land conveyed. If these boundaries had been referred to in the deed, there could have been no question that the extent of the grant would be limited by those bounds, although the true dividing line between the Frosts' and Moor's lots had been further to the northward.

Where a lot is bounded, in a conveyance, by monuments on a supposed line of an adjoining lot, and the monuments do not in fact correspond with the true dividing line, the monuments must govern, as the most certain indication of the intent of the parties. And if the monuments should extend beyond the dividing line, upon an estate not belonging to the grantor, he would be liable on his warranty. This principle is so well established, and so well known, that I apprehend no skillful conveyancer would ever advise a sale by metes and bounds when it was intended that a certain line of another lot should be binding; especially if that line were uncertain. If the line were to govern, the referring to monuments would be useless, and worse than useless, for the grantor might thereby be deceived as to the extent of the grant.

Now we are of opinion, that this rule of construction is applicable to the present case, for although the monument C on the plan is not referred to in the deed, yet it is proved that it was pointed out as a boundary of the lot conveyed, immediately after the sale; and the evidence is sufficient to show that it was so considered by the parties. This was proved by a witness called by the defendant, and is pertinent evidence to aid the construction of the grant: *Waterman v. Johnson*, 13 Pick. 261. And besides, it was admitted at the trial, that C was the north-west corner of the lot conveyed, and it appeared by the testimony of the surveyor, that this corner boundary was several

rods southerly of Moor's line according to the plaintiff's claim, so that running a line from C to A would not correspond with Moor's line, as it was located by the plaintiff's evidence, nor with the line contended for by the defendant, which was from C to B, and there is no evidence of any intermediate line. And besides, the line from C to A is short of the distance as mentioned in the deed; whereas the line from C to B exactly corresponds with the course and distance mentioned in the deed. This is not, however, very material, for if the boundary C was on the line claimed as Moor's line by the plaintiff, the northerly line of the land conveyed to Morse, from whom the defendant derives his title, must be drawn from C to B, although it would not correspond with Moor's true line, the monument B, which is a stump and stones, being expressly named in the deed. And it is also to be remarked, that if A were to be established as the north-east boundary of the defendant's lot, he would be deprived of a large part of the lot he holds under the title derived from the deed to Morse, at his south-easterly corner. From Moor's line the remaining courses are "southerly by land of Aaron Jewett twenty-nine rods to a stake and stones, thence westerly to the bound first mentioned." No stake and stones have been found to control and extend the length of the line by Jewett's land, and on no principle, or rule of construction, can it be extended beyond the distance named in the deed. The result of such a construction would be to defeat the defendant's title as to a larger gore at the south-east corner of his lot, than the gore now in dispute.

Upon the whole there can be no question as to the extent of the land intended to be conveyed. The description is perfect in every particular, excepting as to that part which bounds upon Moor's line. The parties no doubt supposed that the land conveyed would extend to that line. But the supposition was founded in a mistake. The line was uncertain, and they were informed that it ran from C to B, and the whole description shows that that line was referred to in the deed. The true dividing line is still undetermined, but the evidence is sufficient to maintain the verdict for the plaintiff on this point of dispute.

As to the defendant's title by possession, it depends on the question, whether the cutting of wood by the defendant and by those under whom he claims, amounts to a disseisin; and this question has been so often decided, that it must be considered as settled, and not open to argument.

Judgment on the verdict.

COURSES AND DISTANCES ARE CONTROLLED BY MONUMENTS: *Magoun v. Lapham*, 21 Pick. 138; and this, although at the time of the deed the monument did not actually exist, but was afterwards erected to conform to the deed: *Kellogg v. Smith*, 7 Cush. 382, each citing the principal case. *Frost v. Spaulding* is also referred to, to show the admissibility of the acts of parties at the time of the execution, in order to determine the boundaries of land intended to be conveyed: *Crafts v. Hibbard*, 4 Metc. 453; *Cornell v. Jackson*, 9 Id. 154. Known and visible monuments prevail over courses and distances, and over a plan made by a surveyor: *Bradford v. Hill*, 1 Am. Dec. 546 and note; *Howe v. Bass*, 3 Id. 59; *Bryan v. Beckley*, 12 Id. 276; *Doe v. Paine*, 15 Id. 507; *Esmond v. Tarbox*, 20 Id. 346; *Wendell v. Jackson*, 22 Id. 635 and note. Natural boundaries prevail over the number of acres specified: *Dale v. Smith*, 12 Id. 64 and note.

BROWN v. WATT.

[19 PICKERING, 470.]

STATUTE EXEMPTING FROM ATTACHMENT AND EXECUTION beds, bedsteads, bedding, and household utensils of a debtor, necessary for himself, his wife, and children, applies to a man who is not married.

BEDS AND BEDDING USED BY A BOARDER are not exempted.

A COOKING-STOVE not exclusively used for warming the debtor's house is not exempted.

TO RENDER BEDS AND FURNITURE EXEMPT, housekeeping is not necessary.

TRESPASS against a sheriff for attaching certain property claimed to be exempt. Plaintiff, a cabinet-maker, never was married, but hired and furnished a house, in which he and his workmen lived, and wherein a woman was employed as housekeeper. The articles in this house were the ones attached; and all except the two beds and bedding, a cooking-stove, with its appurtenances, and part of a barrel of flour, consisted of household furniture, and were necessary to enable the plaintiff to keep house as above mentioned, and were of the value of thirty dollars; each of the beds, with half its bedding, was of the value of twenty dollars, and the cooking-stove, with appurtenances, was of the value of five dollars. The cause was submitted to the court for its opinion.

A. W. Austin, for the plaintiff.

A. Bartlett, contra.

By Court, WILDE, J. The defendant justifies the supposed trespass, he being a constable of the town of Medford, duly qualified to serve writs in civil suits, under a certain writ of attachment against the plaintiff; and it is agreed that he duly returned the writ with his doings indorsed thereon, under his

hand, to the court of common pleas, wherefrom it issued, according to law. The only question, therefore, is whether any of the goods attached were exempted from attachment as the law was when the writ was served.

By stat. 1805, c. 100, the beds, bedsteads, bedding, and household utensils of any debtor, necessary for himself, his wife and children, were exempted from attachment and execution, provided that the beds and bedding exempted should not exceed one bed, bedstead, and necessary bedding to two persons, and household furniture of the value of fifty dollars.

It has been argued that as the plaintiff had no children and had never been married, he does not come within the true meaning of the statute. But we are of opinion that the statute will not admit of such a construction. The true meaning undoubtedly is, that the property necessary for the debtor, and for his wife and children, if he should have any, should be exempted. By the construction contended for it would follow, that if the debtor were married, but had no children, his property would not be exempted; which can not, as we think, be the true intent of the statute.

It has been further argued, that it can not be necessary for an unmarried man, without children, to keep house, and consequently that the beds and furniture in the present case were not necessary for the plaintiff, as the law requires them to be. This would be giving to the statute a very strained construction, and, as to beds and furniture, would render it useless; for if the word "necessary" is to be taken in its strictest sense, it is not necessary for any one to keep house. But it can not be supposed that the legislature intended to interfere with the choice of the debtor to keep house or not, as he might see fit.

The question, therefore, is not whether it was necessary for the plaintiff to keep house or not, but what was necessary for him, he being in fact a housekeeper.

By the statement of facts it appears, that two beds and bedding were attached, one of which only was exempted from attachment. One bed is exempted, notwithstanding it is provided that the beds and bedding exempted shall not exceed one bed, bedstead, and bedding to two persons; for this proviso is not applicable to a debtor who has no children. All the household furniture also was exempted from attachment, being only of the value of thirty dollars.

The cooking-stove, we think, is not exempted, because it does not appear that it was used exclusively for the purpose of

warming the plaintiff's house, as the statute requires. By the revised statutes the word "exclusively" is omitted, and that statute therefore, would probably admit of a different construction.

Judgment for the plaintiff.

SEIZING PROPERTY NOT ATTACHABLE, LIABILITY OF SHERIFF: *Deyo v. Jen- nison*, 10 Allen, 413, and especially to an action of trespass *de bonis asportatis*: *Bean v. Hubbard*, 4 Cush. 87.

JUSTIFICATION OF OFFICERS BY THEIR PROCESS: *Savacool v. Boughton*, 21 Am. Dec. 181 and note.

EXEMPTIONS.—Cloth from the wool of ten sheep is exempt from execution against a householder who does not own any sheep: *Hall v. Penney*, 25 Am. Dec. 601 and note. An only cow of a non-resident is exempt: *Haskill v. Andros*, 24 Id. 645; or a cow forward with calf: *Dow v. Smith*, 29 Id. 202, or butter made from the milk of an only cow: *Leavitt v. Metcalf*, 19 Id. 718. As to what are "tools" so as to be exempt, see the note to *Kilburn v. Demming*, 21 Id. 545; *Batchelder v. Shapleigh*, 25 Id. 213. Exempt property may be conveyed by the owner even after it has been levied upon under execution: *Paxton v. Freeman*, 22 Id. 74.

STONE v. PATTERSON.

[19 PICKERING, 476.]

PAYMENT OF RENT IN ADVANCE is good, as against vendee of the leased premises without notice of the payment.

ENTRY BY MORTGAGEE OF LEASED PREMISES and demand of payment of rent to him, though it may not be good for the purpose of foreclosure, is lawful, and will entitle him to the rent.

ASSUMPSIT for rent. Knight being the owner of the prem- ises subject to a mortgage to French, executed a lease of the premises to the defendant in April, 1835, for three years, at a certain rent payable quarterly. The defendant paid Knight a part of the rent in advance. A month thereafter Knight con- veyed the premises to the plaintiffs in fee, subject to the mort- gage and lease, without notice of the payment of the rent in advance. Plaintiffs notified defendant to pay rent to them as it should become due. In July, 1835, the mortgagee took pos- session for condition broken, but without notice to the plaint- iffs, and ordered defendant to pay the rent to him from that time, which the defendant agreed to do. The sum paid in ad- vance exceeded the rent accruing between the date of the lease and the entry of the mortgagee.

W. Smith, for the plaintiffs.

G. Parker, contra.

By COURT. The payment of rent in advance was a valid payment and a good discharge *pro tanto* from the claim of the lessor to whom payment was made, and is a good bar to the claim of the plaintiffs, his assignees. The case of *Farley v. Thompson*, 15 Mass. 18, is decisive on this part of the case. It has been argued that the assignees ought to have been notified; and no doubt this would have been necessary, if the rule of law in respect to negotiable securities applied to the assignments of leases; but these assignments are governed by the well-known rule of *caveat emptor*.

In respect to the other portion of the rent claimed, it is quite clear that the defendant was bound to pay it to French, who entered under a mortgage made previously to the lease, and ordered the rent to be paid to him. It is objected that this entry was not a good entry for condition broken, because no notice was given to the plaintiffs. But it is immaterial whether it was a good entry for the purpose of foreclosure or not; for the entry was lawful, and the mortgagee thereby became possessed of the premises, and might have expelled the defendant if he had not agreed to pay rent to him. This was equivalent to an actual and complete ouster or eviction, as was decided in *Fitchburg Mfg. Corp. v. Melven*, 15 Mass. 268, and in *Smith v. Shepard*, 15 Pick. 147 [25 Am. Dec. 432]. Such an ouster or eviction by a person having a paramount title is a good defense to an action for rent by the lessor or those claiming under him.

Plaintiffs nonsuit.

That an entry of the mortgagee with notice to a tenant to pay rent to him, although it may not be a sufficient entry to constitute a foreclosure, will entitle him to the rent: *Cook v. Johnson*, 121 Mass. 328, expressly relying on the principal case.

THAYER v. BOSTON.

[19 PICKERING, 511.]

A HIGHWAY WITHIN A CITY may be established by use of it, as such, for more than forty years.

AN INDIVIDUAL SUFFERING SPECIAL DAMAGE from the obstruction of a highway may have his action therefor, although the act is indictable.

THE SPECIAL DAMAGE, TO SUPPORT SUCH ACTION, must be something not merely differing in degree, but in kind, from that which must be deemed common to all.

ACTIONS OF TORT WILL LIE against a corporation.

A MUNICIPAL CORPORATION IS LIABLE on an action on the case for authorized acts of its officers, for which such an action would lie against individuals, or for acts which it has ratified.

IDEM.—BUT FOR UNAUTHORIZED AND UNLAWFUL ACTS of its officers, though done *colore officii*, the corporation is not liable.

ACTION on the case. The officers of the city of Boston, having charge over its streets and public lands, had taken up the pavement on a passage-way in front of plaintiffs' warehouse, dug up the soil thereof, erected stalls, benches, etc., on the way, and obstructed communication, *per quod*, etc. Plea, the general issue. Verdict in favor of the plaintiffs. If the city were not responsible, plaintiffs were to be nonsuited.

J. Pickering and C. P. Curtis, for the defendants.

Metcalf and C. G. Loring, contra.

By Court, SHAW, C. J. This case, by consent, has been argued in connection with the case of *Stetson v. Faxon* [*ante*, 123], pending in Suffolk, and involves many of the same facts, which were presented in that case, and depends, to some extent, upon the same principles.

The passage-way lying in front of the plaintiff's estates and constituting part of what was formerly denominated Dock square, is variously described, in different counts in the declaration, as a passage-way appurtenant to these estates, and as a public highway. We are apprehensive that some confusion has been thrown upon the case, by treating this right of way as a private right, enjoyed by the plaintiffs in consequence of being seised of adjoining estates, instead of regarding the way as a public highway. It appears that it has been used by all the citizens of the commonwealth, to pass with their horses, carriages, and teams for all purposes, for a period of more than forty years, from a time beyond legal memory, and this proves it to be a highway. Many of the most important highways stand upon this basis and no other; and it would greatly endanger the public interests if a doubt could be raised whether the public have an easement in such highways, for the same purposes, and to the same extent, as in those which are proved by the records of the courts, by whom, in the legitimate exercise of their authority, they have been established. Indeed the law proceeds upon the presumption, that at a period anterior to legal memory, these highways were legally laid out, of which the evidence has been lost. It is doubted whether any other title for the public could be found to the use of the

most frequented streets of the city. The action is an action of the case against the city in its corporate capacity, for special damage, alleged to have been done to the plaintiffs, in their estates, by the officers of the city, having authority over the streets and highways of the city, by acts which they professed to do by virtue of their offices, and for the use and benefit of the city.

It is a well-settled rule of law, that if an individual suffer special damage, by any unlawful act, in obstructing a highway, he shall have his action although the party doing the act is liable to an indictment. But without such damage, although the act is unlawful, and although more injurious to one proprietor on account of his proximity to the highway than another, still he can not have action, because actions would thereby be multiplied indefinitely; but the offender shall be prosecuted by indictment, by which the offense shall be punished, and the wrong redressed once for all. What is special damage to sustain the *per quod* and enable one to have his several action, for an injury common to the whole community, is often a difficult question. It seems to be settled by authorities, that it must be something not merely differing in degree, but in kind, from that which must be deemed common to all. But as this subject has been fully considered in the other case alluded to, it is not necessary in this, to discuss it more at large. Supposing this to be a public highway, and the plaintiffs to have sustained a special damage, so as to enable them, upon general principles, to maintain an action, then it is argued that such an action, sounding in tort, can not be maintained against the city, in its corporate capacity; and whether such action can be maintained, is the question which has been mainly considered in the present case.

The argument strongly pressed by the defendants is, that if the officers of the corporation, within their respective spheres, act lawfully and within the scope of their authority, their acts must be deemed justifiable, and nobody is liable for damages, and if any individual sustains loss by the exercise of such lawful authority, it is *damnum absque injuria*. But if they do not act within the scope of their authority, they act in a manner which the corporation have not authorized, and in that case the officers are personally responsible for such unlawful and unauthorized acts. But the court are of opinion that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results.

There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it can not be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. And it may be added, that it would be injurious to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers, and subordinate persons, might well refuse to act under the directions of its government in all cases, where the act should be merely complained of and resisted by any individual as unlawful, on whatever weak pretense; and conformably to the principle relied on, no obligation of indemnity could avail them.

The court are therefore of opinion, that the city of Boston may be liable in an action of the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government, invested with jurisdiction to act for the corporation, upon the subject to which the particular act relates, or where after the act has been done, it has been ratified, by the corporation, by any similar act of its officers.

That an action sounding in tort will lie against a corporation, though formerly doubted, seems now too well settled to be questioned: *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham etc. Gaslight Co.*, 1 Ad. & El. 526. And there seems no sufficient ground for a distinction in this respect, be-

tween cities and towns and other corporations: *Clark v. Washington*, 12 Wheat. 40; *Baker v. Boston*, 12 Pick. 184 [22 Am. Dec. 421].

Whether a particular act, operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case. As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation.

As the evidence was not submitted to the jury in the present case, and the fact does not appear, but it is only found that the acts complained of were done by officers of the city, the court are of opinion that the verdict must be set aside and a new trial granted.

HIGHWAYS BY DEDICATION: See the note to *Hobbs v. Lowell*, *ante*, 145.

CIVIL ACTIONS FOR NUISANCE: See the note to *Stetson v. Faxon*, *ante*, 123, and *Wesson v. Washburn Iron Co.*, 13 Allen, 101, citing the principal case.

TORT WILL LIE AGAINST A CORPORATION: *Bigelow v. Inhabitants of Randolph*, 14 Gray, 544; *Moore v. Fitchburg R. R. Co.*, 4 Id. 467; *Oliver v. Worcester*, 102 Mass. 500; *Hawks v. Charlemont*, 107 Id. 418; *Haskell v. New Bedford*, 108 Id. 211, where a distinction as to corporate liability is made on the authority of adjudged cases between the acts of officers as such and as agents of the municipal corporation, citing the principal case. *Thayer v. Boston* is also cited, among other decisions, in *Hall v. Holden*, 116 Id. 172, 176, to establish the proposition that the vote of a municipal corporation to repay money improperly paid to it by its agent is irrevocable. In this series are decisions supporting the liability of a corporation in actions for torts of their agents: *Riddle v. Proprietors*, 5 Am. Dec. 35 and note, considering the subject somewhat at length: *Chestnut Hill T. Co. v. Rutter*, 8 Id. 675; *Goodloe v. Cincinnati*, 22 Id. 764 and note.

DONHAM v. WILD.

[19 PICKERING, 520.]

FOR LOSS OF ATTACHED GOODS in the keeping of a bailee of the plaintiff's nomination, the sheriff is not liable.

ACTION on the case against a constable for failing to levy an execution upon goods attached in an action brought by Don-

ham against Pray. Wild, on attaching the goods, requested Donham to name some keeper whom he could trust. He thereupon named one Cushing, who suffered them to be taken by other creditors. The cause was submitted on these facts.

Metcalf and Gourgass, for the plaintiff.

Cushing and Kingsbury, contra.

MORTON, J. The officer who attaches personal property, is bound to keep it in safety, so that it may be had to satisfy the execution which may follow the attachment. This duty he may perform himself, or by the agency of others. If he appoint an unfaithful, or intrust it with an irresponsible bailee, so that it is lost through the negligence or infidelity of the keeper, or the insufficiency of the receiptor, he will be responsible for the value of the property. The defendant's conduct in the present case, unexplained, clearly renders him liable; and the only question is, whether he is exonerated by the acts of the plaintiff.

It does not seem to us, to be material whether Cushing is to be deemed keeper or receiptor. The goods were placed in his possession; they are not forthcoming, and can not be found; and he is wholly unable to make compensation for their loss. If the defendant is responsible for his conduct, he is, in either case, clearly liable. The defendant, however, is guilty of no neglect, in omitting to make a demand upon him for the goods. A demand would have been perfectly useless and nugatory. And no officer is to be prejudiced for neglecting to do that, which could be of no possible benefit to anyone: *Webster v. Coffin*, 14 Mass. 196; *Cooper v. Mowry*, 16 Id. 8.

An officer, in the service of writs, though bound to follow and not violate the rules of law, yet in many respects, acts under the direction of the plaintiffs. They may direct him what goods to attach, and he will be safe in following their orders in relation to the manner of keeping them. The plaintiff need not give any advice or directions; in which case the officer will be bound to follow the rules of law and will be responsible for any deviation from them. But if the plaintiff does interfere, it would be a violation of the first principles of justice, to authorize him to recover against the officer for any loss which might result from following his advice or directions.

The officer might select the plaintiff himself for keeper or receiptor, and if he consented to act in either capacity, and the attachment was lost by his negligence or misconduct, nothing

can be more clear than that the officer would be relieved from his liability. So if the officer accepts a receptor or appoints a keeper at the request, by the advice, or with the consent of the plaintiff, he, and not the officer, is responsible for the sufficiency of the one, and the fidelity of the other.

These principles are so obviously just and sound, that direct adjudications in support of them can hardly be expected to be found. The most analogous cases which we have seen are those of *Hamilton v. Dalziel*, 2 W. Bl. 952, and *De Moranda v. Dunkin*, 4 T. R. 119; in which it was holden, that if the sheriff appoint special bailiffs, at the request or on the nomination of the plaintiff, he is not responsible for their fidelity and good conduct.

In the case at bar, the defendant, having, by the plaintiff's agreement, placed the property in the hands of a person, who has suffered it to be removed and lost, is not liable to an action for neglecting to levy the execution upon it.

Plaintiff nonsuit.

CHASE v. MERRIMACK BANK.

[19 PICKERING, 564.]

ON AN EXECUTION AGAINST A TOWN OR PARISH, the body or estate of an inhabitant may be lawfully taken to satisfy it.

CERTIFICATE OF MEMBERSHIP IN A PARISH IS NOT NECESSARY in order to make one liable as an inhabitant where he has been voted a member, has attended the parish meetings, and has acted as a trustee of the ministerial fund.

EXECUTION CAN NOT BE LEVIED upon the property of one who, though a member of the parish when the judgment was rendered, had ceased to be such before the levy. (In note.)

RETURN OF AN EXECUTION, showing advertisement of sale three weeks before the time of sale, instead of the day of sale, shows a sufficient notice.

AMENDMENT OF A RETURN to show that a copy of the execution had been left with one having property of the debtor, will be permitted, it having been satisfactorily proved that such was the fact.

ACTION to recover dividends on certain shares in the defendants' bank, belonging to the plaintiff. The dividends had been levied upon under an execution issued against North Parish, in Haverhill, in favor of one Peckham. The case sufficiently appears from the opinion. With respect to the amendment of the return of the execution alluded to in the opinion, the facts were that the return omitted to state that an attested copy of the execution had been left with the bank cashier; but the par-

ties agreed that such amendment might be made if deemed proper by the court, on a satisfactory showing that a copy had been left.

Choate and Duncan, for the defendants.

Cushing and Minot, contra.

By Court, WILDE, J. This case has been very ably argued, and if the principal question raised were now to be decided for the first time, it might be necessary to enter into the discussion of the principles on which it depends, more fully than we now deem it necessary to do. The question is whether, on an execution against a town or parish, the body or estate of any inhabitant may be lawfully taken to satisfy it. The question appears to have been settled in the affirmative by a series of decisions, and ought no longer to be considered as an open question.

It is generally true that an individual member of an aggregate corporation is not liable for any debts or demands against it. But to this principle, says Dane, our towns and parishes in Massachusetts are by immemorial usage an exception. For on such an execution the body or estate of any inhabitant may be taken to satisfy it: 5 Dane Abr. 158. The same doctrine is laid down by Chief Justice Parsons, in *Riddle v. Merrimack Locks etc.*, 7 Mass. 187 [5 Am. Dec. 35], and the sound reason, it is said, is, that as towns, and other such quasi corporations, have no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. In the case of the *Inhabitants of Brewer v. The Inhabitants of New Gloucester*, 14 Mass. 216, it was decided, that when judgment is recovered against the inhabitants of a town, execution may be levied upon the property of any inhabitant, as each inhabitant must be considered as a party to the suit. And there is clearly no distinction, in this respect, between the liability of an inhabitant of a town, and that of an inhabitant of a parish. The same doctrine is laid down in *Merchants' Bank v. Cook*, 4 Pick. 414: "Towns, parishes, precincts, etc., are," it is said, "but a collection of individuals with certain corporate powers for political and civil purposes, without any corporate fund from which a judgment can be satisfied, but each member of the community is liable in his person or estate to the execution which may issue against the body."

The same principle has been recognized as settled law in the state of Maine: *Adams v. Wiscasset Bank*, 1 Greenl. 361 [10 Am.

Dec. 88]; *Fernald v. Lewis*, 6 Id. 264. And it is so considered by Chancellor Kent, in his commentaries: 2 Kent Com., 3d ed., 274. So in the case of *Attorney-general v. The Corporation of Exeter*, 2 Russ. 53, Lord Eldon held, that if a fee farm rent was chargeable on the whole of a city, it might be demanded of any one who holds a part of or in the city, and he would be left to obtain contribution from the other inhabitants.

These authorities we consider as conclusive and binding, whether they be founded on general principles, or on an analogy between the liabilities of the inhabitants of towns and parishes and hundreds, or upon immemorial usage.

It is, however, denied by the plaintiff, that he was one of the inhabitants of the north parish in Haverhill, against whom the execution issued, and on which his property has been taken; because he did not file a certificate of membership, as directed by the statute of 1811, c. 6, or by that of 1823, c. 106. But these statutes do not prohibit a party from joining a parish in any other manner than is therein prescribed, as was decided in *Leavitt v. Truair*, 13 Pick. 113. The agreement of the parties is sufficient to constitute membership. The plaintiff in 1831 was admitted as a member of the parish, by a vote of the parish; he has since attended the parish meetings and has voted as other members of the parish have, and has been chosen a trustee of the ministerial funds of said parish. These acts constitute him a member of the north parish, whether by reason of his not filing a certificate, in pursuance of the act of 1823, c. 106, he is liable to be taxed in another parish or not.

The next question to be considered is, whether the officer gave sufficient and legal notice of the time and place of sale of the bank shares taken on execution. By the return of the officer it appears that notifications were posted up, as the law directs, in two public places in the town where the sale was to be made, and in one public place in each of two adjoining towns, thirty days before the time appointed for the sale; and that an advertisement, expressing the time and place of sale, and against whom the execution issued, was published three weeks successively, before the time appointed for the sale, in the *Essex Gazette*, a newspaper printed in said Haverhill. The objection to the sufficiency of the notice is, that it was not published three weeks before the day of the sale, as the statute requires, but three weeks before the time of sale. But we are of opinion that the statute ought not to be thus strictly construed. The time of sale and the day of sale are, we think,

named in the statute indiscriminately, and that they were intended to convey the same meaning, and to have the same effect. That sufficient notice was given for all useful purposes, can not be doubted, and a literal and strict construction ought not to be adopted to defeat a fair sale.

The other objection to the return of the officer is removed by an amendment of the return, which we are of opinion the officer ought to be allowed to make, the truth of the facts having been satisfactorily proved.

Judgment for the defendants.

Peckham recovered another judgment against the parish subsequently, and delivered the execution to the sheriff; but it appearing that Chase had delivered to the clerk of the north parish in the morning of the fourth of April, 1836, a certificate that he no longer considered himself a member of the parish, and the execution was not levied on the shares in the bank until the afternoon of the same day, although Chase had since been present at parish meetings, and had continued to be one of the trustees of the ministerial fund, the following opinion was rendered:

“By COURT. Upon the facts agreed, the plaintiff, we think, is entitled to recover the amount of the dividend claimed, as before the sale of the shares he had ceased to be a member of the parish. The execution, therefore, did not run against him or his property, although he was a member of the parish when judgment was recovered.”

Affirmed, on the proposition that an execution against a municipal corporation may be levied upon the property of an individual inhabitant therein, in *Gaskill v. Dudley*, 6 Metc. 552; *Richardson v. Butterfield*, 6 Cush. 194.

Followed, in respect to the amendment of the sheriff's return on an execution, in *Shepherd v. Jackson*, 16 Gray, 600. Return of a summons may be amended according to the facts to show that a copy left at the defendant's residence was left with a member of the family: *Crocker v. Mann*, 26 Am. Dec. 684 and note. Even after judgment a sheriff may, by leave of the court, amend his return on a writ, *nunc pro tunc*, in order to show that the writ was in fact served on the defendant before the judgment was rendered: *Hefflin v. McMann*, 20 Id. 58. That the application to amend is addressed to the sound discretion of the court is laid down in *Freeman v. Paul*, 14 Id. 237; and recognized in *Barnard v. Stevens*, 16 Id. 733. This subject is discussed in a note to *Malone v. Samuel*, 13 Id. 172.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

VICK v. MAYOR AND ALDERMEN OF VICKSBURG.

[1 HOWARD, 379.]

DEED OR WRITTEN GRANT IS NOT NECESSARY to establish dedication of commons or highways to public use; nor is it necessary that there should be a grantee in existence, to take the fee out of which the incorporeal hereditament is to arise, at the time of the supposed dedication.

INTERESTS OF THOSE BENEFICIALLY ENTITLED TO EASEMENTS or dedications of a public, charitable, or religious character, are not allowed to lapse or fail for want of what is technically called a person to take the legal title; but the public, in whose favor the strict rules applied to like transactions between individuals are relaxed, must be a material party to the act out of which its interest is supposed to arise.

PARTIES ARE AS NECESSARY TO A DEDICATION as to a private grant.

ACTS OF PROPRIETORS WITHIN INHABITED CITIES and villages of established boundaries, by which a dedication is established, must be, either in themselves, or from the relations of the parties, of an open, palpable, deliberate, and public character.

NO PARTICULAR FORM IS NECESSARY in dedication of land to a public use; the assent of the owner, and the fact of its being used for the purpose intended, are all that is required.

MERE INTENTION OF PROPRIETOR OF URBAN LANDS to dedicate them to a public use does not amount to a dedication thereof, nor are his strictly private acts or declarations to be regarded as evidence of such dedication.

AUTHORITY OF PROBATE COURT TO GRANT LETTERS of administration with the will annexed, is limited to the case where the executor refuses to render an account, or where he becomes insane.

APPOINTMENT OF SUCH ADMINISTRATOR IS NULL AND VOID where the act of appointment fails to state a case that gives jurisdiction to the court.

EXECUTOR CAN ONLY BE REMOVED BY THE PROBATE COURT'S GRANTING LETTERS, *cum testamento annexo*, to another; the superior court has no power to remove an executor for any cause; and its judgment removing him is, therefore, void.

NOTICE MUST BE GIVEN, IN CASE OF PARTITION among heirs and devisees, to all who do not join in the petition, or they will not be bound by the acts of the court.

PUBLIC, COMPOSED OF INDIVIDUALS WHO COME IN BY ACTS OF DISSEISIN and intrusion, subsequent to a dedication of urban property by the owner, can not be regarded as the objects of his bounty and regard.

APPEAL from chancery. The opinion states the case.

Prentiss, Guion, Bodley, and Harrison, for the appellants.

Holt and Grayson, for the appellees.

By Court, BOYD, J. The bill in this case was filed by the complainants in the superior court of chancery at the last July term, for the purpose of quieting their title to a tract of ground, designated as "commons" and "Levee street," on the recorded plat of the town of Vicksburg, and to enjoin and restrain the defendants from prosecuting several actions of ejectment, then pending in their favor, against the complainants in the circuit court of Warren county, for the recovery of the same tract. A perpetual injunction was also prayed for, to prevent the defendants from proceeding further to erect permanent buildings, warehouses, and storerooms on the premises, to the common nuisance of the citizens of Vicksburg and the public. The title to this strip of land, lying between the front row of lots and the Mississippi river, and to the easement therein, and the use thereof, is claimed in the bill to be vested in the complainants as trustees and representatives of the rights and interests of the citizens of Vicksburg, by virtue of several acts of dedication, and the statutes of the state, constituting them a body politic. The answers of the defendants, denying any dedication of the property in controversy, and setting up affirmatively, their claim to it, under Newit Vick directly, or by derivative title, thus tracing their rights and interests, whatever they might be, to the same source with the complainants, narrowed the inquiry before the chancellor to a single question. The ultimate right of fee was not in controversy. Neither the full assertion of their fiduciary character, and the establishment of the easement by the complainants, nor the complete vindication of the acts of the defendants, in erecting the buildings and nuisances complained of, and in prosecuting their actions of ejectment, involved the decision of that point.

Indeed, the right to the fee might be decided to be in the appellants, in perfect consistency with all the claims set up in the bill, on behalf of the appellees. The easement is but an incumbrance, and, if properly shown to exist, may be perpetual.

Both parties rested their title on Newit Vick, and recurred to him, as its only source: and the case, thus presented, leaves his estate, real and personal, as it stood at the time of his death, except so far as he had diminished or abridged it. It passes to his heirs general, unless that disposition is altered by devise: it passes absolute, and untrammelled, except by his act. The complainants, then, in order to have succeeded before the chancellor, in the prayer of their bill, must have shown that those whom they impleaded, had no just right to do the acts complained of; because those acts were inconsistent with the rights acquired by them, through their ancestor. So far as this controversy was concerned, the defendants had, at all times, absolute and full right of possession to all the estate of Newit Vick, after his death; unless those who demanded the interposition of the court, could show a restriction or abridgment by him, of that right. This was the situation of the case, as it was presented to the chancellor; and, in granting the prayer of the bill, he, in effect, decided that the estate of Newit Vick, or that part of it embraced in the recorded plat of the town, was incumbered with an easement to the extent claimed in the bill, and that a perpetual right of possession to the "commons" and "Levee street," in opposition to the appellants, existed in favor of the appellees, as trustees, for the use of the citizens of Vicksburg.

The same points are now before us on this appeal. And we are to decide whether complainants have shown a case sufficient to prevent the defendants from asserting their title, by devise, from Newit Vick, to that portion of his estate here in controversy. Their claim is of an incorporeal hereditament; a perpetual incumbrance or easement; and that claim is based upon the ground of a dedication, or appropriation for their benefit.

This dedication is alleged to have been made in various ways. As to that portion designated as "commons," in contradistinction from "Levee street," the acts of Newit Vick, in his lifetime, and of John Lane, as administrator, with the will annexed, are relied on as the foundation of complainants' title. In regard to what is known as "Levee street," the claim of the easement is rested partly upon the proceedings of commissioners appointed by the probate court of Warren county, and partly upon the acts of Lane, as administrator, and of the heirs and devisees of the testator.

We do not consider these distinctions and divisions of much importance, except so far as they may aid in arranging and simplifying the various proofs, exhibits, and pleadings in the

cause. The acts of dedication, if they exist, must, in order to effect the rights of the defendants, connect themselves with their ancestor, or proceed from themselves. The executor of Newit Vick, the administrator, with the will annexed, and the commissioners of the probate court, in their appropriate spheres, represent the testator. Their acts are his acts, and his heirs and devisees can not gainsay them. Their own acts stand upon the same footing; and they may also adopt or ratify what has been done by others, and thus make it their own, so as to be bound by it.

The questions, then, resolve themselves into these: Has there been a dedication of the easement in question by Newit Vick or his authority, or by the defendants themselves?

The common law rules, in reference to the acquisition of real property, and the rights and interests of a permanent kind, growing out of land, have been materially modified and relaxed by a long train of decisions, connected with the subject of dedication. A direct act of dedication would probably still require a deed or writing: 3 Kent, 434. And the act, of whatever character it may be, by which the public right is claimed, must come from the owner of the fee: 4 Barn. & Cress. 574;¹ 1 Stra. 999; 5 Barn. & Ald. 454.² And it must be done openly, and with a deliberate purpose: 1 Camp. 262;³ 1 Greenl. 111.⁴

Something of inaccuracy and confusion will be found in most of the American decisions, when an attempt is made to draw the distinction between express and implied dedications. The proof of a dedication to public or charitable purposes, may be of various grades. The terms "implied," or "by implication," should more properly refer to the testimony, or grades of evidence, than to the fact to be proved. Prescription supposes a grant, and may amount to one for all legal purposes: 3 Kent, 452. So a grant may be presumed, from circumstances inconsistent with any other supposition, and which estop the grantor, by matters *in pais*, from denying it: 6 Pet. (S. C.) 439;⁵ Co. Lit. 56.

These remarks may serve to give greater certainty to our inquiries, as to what acts will be sufficient to establish the fact of a dedication of "commons" or highways to public use. For that purpose, a deed, or written grant, is certainly not required: 2 Stra. 1004.⁶ Nor is it necessary that there should be a grantee

1. *Harper v. Charlesworth.*

2. *Wood v. Veal.*

3. *Res v. Lloyd.*

4. *Belkum v. Turner*; S. C., 10 Am. Dec. 26.

5. *City of Cincinnati v. White.*

6. *Lade v. Shepherd.*

in existence, to take the fee, out of which the incorporeal hereditament is to arise, at the time of the supposed dedication.

The authorities to this last point are numerous, and have been carefully examined by the court; they introduce a material deviation from the general principles of the common law; which would require a grantee in all such cases. The whole doctrine of contracts and grants, is based upon the idea of parties capable of contracting; and although in reference to the public, and their claim to easements in land, a looser rule has been adopted, yet the relaxation is not considered to go to the extent, that there can be a dedication or grant, without some party beneficially interested in it, besides the grantor.

The reason of the rule will fix its limits. In the case of *Beatty v. Kurtz*, 2 Pet. (S. C.) 256,¹ the dedication was for a burial place for the Lutheran church. It appeared that there never was, down to the time of the suit brought, any such incorporated church; but the society beneficially interested, had always used the ground as a burial place, from the time of the dedication. In 9 Cranch, 292,² a similar state of facts was shown. And, in both cases, the want of a grantee was not suffered to defeat the interests of those beneficially interested. Public considerations were held to support the grant in favor of the beneficiary. The decisions may be sustained on the ground that the proprietor should be estopped from asserting any claim, so long as the land remained in public use, or that no absolute divestiture of the fee was necessary to support the use; and, in either case, the enjoyment of the easement would remain perpetual.

The laying out of a public highway in the country, presents the same view. The land owner may be considered as estopped by his act of laying out the road, from interfering with the public right of passage and travel. Or he may be regarded as holding the fee, incumbered by his acts of dedication; and the general claim of the citizens can be sustained. The amount of the decisions seems to be, that the interests of those beneficially entitled to easements or dedications of a public, or charitable, or religious character, will not be permitted to lapse or fail, for want of what is technically called a person, to take the legal title. The rule is expressly in favor of the equitable or beneficial claimant. It is intended to support and defend his interest. He is a favored party, in the view of the law, and receives its peculiar regards. For his benefit, the strict principles ap-

1. 2 Pet. 566.

2. *Town of Pawlet v. Clark*.

plied to similar transactions with individuals, are departed from, "and adapted to the nature and circumstances of the case, to carry into effect the object of the grantor, and to secure the benefit held out and expected to be derived from and enjoyed by the dedication:" 6 Pet. (S. C.) 435.¹ The public, sustaining this favored relation, must be a material party to the act, out of which its interest is supposed to arise. Upon no other ground can its claim be based. If it should be held that there could be a valid grant, without a grantee, and, at the same time, be decided that there need be no other party to the transaction, legally or equitably interested, except the grantor, it would necessarily follow, that the fee-simple title in land might be incumbered, or fully conveyed away, by an act beginning and ending with the owner of it. Connected with this, take the principle that the grant may, in favor of the public, be without deed; and a complete divestiture of the largest estate known in the law, might be brought about by the mere volition of an individual, or by words uttered only in his own hearing.

Such conclusions are not warranted by any just view of the settled laws of the country. No one can lessen his estate in land but by some act which gives a right to another. Parties are necessary, as well to a dedication, as to a private grant. The authorities already referred to, clearly sustain the view here expressed. It will be amply supported by those to which we shall give our attention, in examining the next point.

The necessary parties being established, let us now inquire by what acts, according to adjudged cases, the right by dedication may be granted and acquired. The case in 11 Wend. 487,² decides several important principles. It was there held, that the recognition, by a proprietor, in the city of New York, of the plan of the city laying out his grounds into streets, was a dedication of the streets, to be taken for public use, whenever the corporation should think proper to open them.

All the grantees from the same proprietor were considered to have an interest in all the streets, and that interest was supposed to extend to every person liable to be assessed. The sale of a single lot, it was said by the chief justice, adopted the map and appropriated the ground as streets, and without the sale of any lot, the operation of the statute, by compelling him to make the streets, effected the same thing. The whole transaction is likened to a contract; and in 19 Johns. 186,³ that

1. *City of Cincinnati v. White*.

2. *Wyman v. New York*.

3. *Underwood v. Stuyvesant*; 8. C., 10 Am. Dec. 215.

contract is said to be, in effect, "I engage to give the ground for the streets, according to the map, upon condition that the corporation shall ratify it." The statute referred to is more fully noticed in 1 Wend. 270, 271.¹ It gives the corporate authorities the right to open the streets laid down on the city map by the commissioners, at the instance of three fourths of the owners of lots, etc., and then regulates the assessment of damages. "The streets until actually opened, are not regarded as highways, but the proprietors adjoining have a right of way over the lands of the grantor, from their lots to the public highways or streets." In both of these cases, there had been sales of various parcels upon the tract of the proprietor, according to the city plat. Similar decisions, and depending upon the same considerations, are to be found in 2 Id. 472;² and 8 Id. 85.³

In Paige's reports, 513, these principles, as settled by the courts of law in the state of New York, are decided to be "applicable to the case of a similar dedication of lands, in a city, or village, to be used as an open square or public walk." The rule extracted from all the authorities above cited, is said to come to this, "that when the owners of urban property have laid it out into lots with streets and avenues intersecting the same, and have sold lots with reference to such plat, it is too late for them to resume a general and unlimited control over the property, thus dedicated to the public."

It is unnecessary to notice the points made or decided in the cases already briefly referred to, except so far as they are supposed to have a bearing upon the facts before us; they abound in varied learning and ability, and give a clear view of all the rights of way, and easements, public and private, which grow out of the social system. The material point is, that the acts of a proprietor, within the limits of a city or village, of known and established boundaries, and peopled with inhabitants, by which a dedication may be established, must be either in themselves, or from the relation of the parties, of an open, palpable, deliberate, and public character. The dedication, even, which is considered to rest on implication, such assent and user, sale at increased value, etc., requires that the testimony, or circumstances detailed in proof, which evince the appropriation, should be of the same kind, and absolutely inconsistent, according to the rules of law, and the obligations of

1. *Matter of Seventeenth Street.*

2. *Matter of Lewis Street.*

3. *Livingston v. New York*; 8. C., 22 Am. Dec. 622.

good faith, with any other supposition. It is but the general doctrine governing presumptions in law: 2 Bl. Com. 92; 2 T. R. 81;¹ 3 Bac. Abr. 107; 2 Atk. 83;² 2 Bay, 240; Cro. Eliz. 300;³ Matt. Pres. Ev. 16, 17, note 3334 *et seq.*; 4 Camp. 16.⁴

A thorough examination of the principles connected with this part of the case was made by the supreme court of the United States, in 6 Pet. (S. C.) 432-444,⁵ and 498-514.⁶

In the first of these cases, the facts in evidence were sufficient to warrant the presumption of an absolute grant: Id. 439. It was, however, held, that no particular form was necessary in the dedication of land to the public use; it only required the assent of the owner, and the fact of it being used for the purpose intended. The proof was that there had been a plat publicly made and exhibited, at the time of laying out the land in controversy, and assented to by all the proprietors; the lots in every part of the tract, were sold by them in reference to that plat, and the square, or commons reserved, had been used, from the time of the settlement of the town, by the proprietors and public together.

The court based their decision on the ground, that the right in the easement depended on the same principles, as the right to the use of the streets by the public; and at page 438, it is said, "no one will contend, that the original owner, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public." In the case at page 438, of the same volume, the dedication claimed was placed on the grounds of declaration to the citizens, at the time of laying out the tract; the reservation by a plat then publicly made and exhibited; and a use, long continued by the public, so far as the convenience of the citizens required. The use, however, was not considered material, if the dedication were absolute. The whole town had been settled, and the lots improved, in reference to the plat by which the sales had been made, and in the continued presence of the person dedicating; although the particular street, or common, had not been regularly opened, and appropriated fully to its destined purposes, for many years.

These authorities strengthen and confirm the views already expressed, and they clearly illustrate who should be the parties necessary to every act of dedication, as well as the character of the act itself.

1. *Milward v. Thatcher.*2. *East India Co. v. Vincent.*3. *Dell v. Babthorpe.*4. *Rez v. Barr.*5. *Cincinnati v. White.*6. *Barclay v. Howell.*

The principles and reasons of the same authorities also lead to another and most important conclusion, that the acts of individuals, wholly immaterial, and of no efficacy whatever in themselves considered, may acquire a strong and binding force, sufficient even to change the proprietorship and use of real estate, merely from the relations subsisting between the parties to such acts. Those relations may be the result of express contract, or of that accidental community of right and interest, which belongs to all organized societies, and arises from the presumed assent of the citizen to the laws, and municipal regulations, by which he acquires, holds, and enjoys his property. We do not intend to quarrel with these decisions; but we are not disposed to extend their application. They have gone quite far enough in maintaining claims in favor of the public, against common right: 4 McCord,¹ 98, and cases cited.

In pursuance of these views of the law, the drawing of a map, or the recognition of one drawn by others, it has been seen, was held sufficient to bestow most important privileges. The implied acquiescence of the citizen, in the legislative and corporate enactments by which a portion of his real estate may have been brought, against his wishes and exertions, within the limits of a given city, or town, and the further presumption, as often false as true, that an individual in this situation assents to the ordinances, by which land, thus forced from his own control, is surveyed and laid off as the views and inclinations of others may direct, have been considered an ample warrant to deprive the owner of large and valuable portions of his property. To these presumptions, all of them against the landholder, the law annexes one in his favor, and that is, that he will be presumed to have received an equivalent benefit, on an arbitrary and fancied estimate of the increased value of the remainder of his estate; a value which he can seldom realize, but in a single way, by making his property a thing of barter and sale, and throwing it upon the sweeping currents of traffic and commerce, contrary, perhaps, to the most cherished and powerful attachments and associations of life. The decisions, however, are such as we find them; and rigid and harsh as they must frequently be, in their operation upon private rights, it is not our purpose here to attack their judicial weight and sanction.

Examined in the light of these adjudications, so favorable to the community at large, the supposed acts of dedication, or

1. *Taylor v. Hampton*; 8. C., 17 Am. Dec. 710.

those evincing a dedication, by Newit Vick, will not bear the test of legal scrutiny.

The mere intentions of the proprietor can not be made the subject of speculation, or the foundation of right by the complainants. The declarations made by him, of those intentions and designs, as they were, in every instance, private, and, with an unimportant exception, to the single individuals who detail them in proof, can have no greater efficacy for that purpose. His offer to sell to one of the witnesses, and refusal to sell to another, as they met him in the prosecution of his own views, upon his own premises, are of the same nature and legal effect. There was nothing of publicity about them; they were accidental, isolated, individual transactions; out of which no rights were created, even as between the parties to them.

The drawing of the plats, under the circumstances of the case, was an act wholly private, and of no moment whatever, in this controversy. The first one spoken of, was merely a sketch in pencil, showing the extent to which he had proceeded in running his lines. As he went on, in the midst of his own field, he drew another draft of his work, and, probably, his plats kept pace with his daily labors. No legal consequences whatever can proceed from such acts, in favor of the public, or of individuals. No obligations, or duties, on either side, could be predicated upon them. It is expressly proved that these occurrences were all private, though not, in the language of the witnesses, "confidential." The very situation of the case shows that it must have been so.

Next, as to the sale of the lot on which Centre lived. Templeton swears positively, that Centre occupied his house and lot in the open field, "before any lots were laid off, or the town commenced." Walcott is uncertain upon the point; but Templeton is clear and explicit. Centre held by sufferance, permission, or contract, with Vick; this is recognized in his will, and a conveyance is directed when three hundred dollars should be paid. This contract, whatever it may have been, was abandoned by Centre; and the premises, in pursuance of an understanding among the heirs, were conveyed to Hartwell Vick, or his children. The whole contract was one of private agreement, between Vick and Centre, before the commencement of the town; whether it had reference to the future city, never can be ascertained; but there were no interests connected with it, and growing out of it, except those of the contracting parties.

The last act relied upon, at bar, to show a dedication of the

"commons" by Newit Vick, is the grant of lot No. 1, by deed to Rogers. The deed describes the lot as "lying and being in the plat of the town called Vicksburg, on the Mississippi river, near the mouth of Glass' bayou, being the corner of Water and Centre streets." The sale to Rogers must be considered in reference to the circumstances under which it was made. The whole tract of two hundred acres, which now constitutes the site of Vicksburg, was then a dilapidated and abandoned cotton field, or a wild, unsubdued forest. It was the sole property of Vick, wholly unoccupied, except by his tenant, Centre, and at a distance from any settlement. Rogers and Vick, at the time of the grant, stood alone on the unpeopled banks of the Mississippi; and we know nothing of their mutual understandings, conversations, or contracts upon the subject, but from the deed, and the situation of the parties. The transaction was as private as the solitude of the wilderness could make it. What inferences, in this state of things, are to be drawn from the descriptive words in the deed? In the first place, no particular plat is referred to, and none is before us, corresponding in all its parts, with this, so imperfectly noticed in that instrument. Water street and Centre street are not designated on the city plat; and the drafts, spoken of by the witnesses, had no street, but a public common, in front of lot No. 1. But, passing by this irregularity or defect in proof, it is clear that Rogers purchased with a full knowledge of the situation of things at the time. Vick's intentions were not fully developed, even to his own mind. He was progressing with them, from the time of his first rough sketch, till his death. They were his own private plans and designs, liable to be altered, modified, and changed at pleasure, or to be interrupted and broken up by accident. That they were never consummated, is positively proved. The descriptive words in the deed, referring to the boundaries by streets not yet opened, could not, under such circumstances, import more than an implied covenant to allow the grantee a convenient right of way, in those respective directions, to the next market road or highway. They created a rural, and not an urban servitude: 19 Johns. 181-188;¹ 4 Mass. 589;² 8 Wend. 98, 99;³ Matt. Pres. Ev. 336.

Even that implied covenant might be wholly changed, against the wish of the grantee, as to the mere direction in which the

1. *Underwood v. Stuyvesant*; S. O., 10 Am. Dec. 215.

2. *Olap v. McNeil*.

3. *Livingston v. New York*; S. O., 22 Am. Dec. 622.

right of way should extend, by matters subsequent to the grant: 19 Johns. 187.

Again, if the easement claimed could be created by force of the mere description in this private act, the same result would follow, if the deed had been a deed of gift. The consideration of four hundred dollars gives no strength or additional force to the words in question. That circumstance might raise an equity in favor of the grantee, but would not affect, in the slightest degree, the terms employed in the conveyance. The question here, is as to the legal import of those terms, and the supposed rights of the public, growing out of their use: and we are clear, that no right, of any kind, under the circumstances, can be predicated upon them, except in favor of Rogers, and that was a mere right of way, and of no permanent, fixed, or immutable character.

The advanced price paid by Rogers, was much relied on by counsel. It is not clear what was the inducement for the purchase. The witness thinks the lot was sold at a high price, by reason of it being a front lot; but whether he alluded to the advantage as coming from the front on the river, or the front of the contemplated city, is not stated. Judging from Rogers' acts, subsequently, he considered the value to consist in the command which it gave him of the area between him and the bank; for he improved it in a way absolutely inconsistent with any public use whatever; and it continues thus improved to this day, under the authority of the complainants. But, whatever was his inducement to give that sum for the lot, was a matter wholly between him and his grantor; and, under the testimony, we see no reason to suppose that he could ever have laid claim to anything more from Vick than the performance of the dry covenants of his deed. If he acquired other rights, they extended over the whole tract; for it was all open and unoccupied alike, and even the supposed lots were all used as a thoroughfare.

One other view of this part of the cause. Is there anything in the testimony, or the situation of the case, to show that Rogers could not have released to Vick, at any time before his death, all the privileges, appurtenances, rights, and easements, public or private, springing from the deed to him? Certainly not. There was nobody else there to raise any question about it. This is conclusive on the point; it shows that the whole transaction, properly weighed, began and ended with Rogers and Vick. There were no parties to it but themselves; there

were none in a situation to be affected by it, either favorably or unfavorably; and, of course, none who could claim anything of benefit or advantage from it. Rogers acquired rights by it, and he alone. But the question made upon this point has not been what Rogers acquired, but what the public acquired; and the response to it comes up from every page of the record; there was no public there, at that time, nor for two years after, to acquire any rights whatsoever in reference to the subject. At this stage of the case let us pause, and inquire whether the supposed easement in question could have vested, after the death of Vick, and till the first sale of lots, in 1822, by John Lane? It would be difficult to answer the inquiry in terms compatible with its existence anywhere.

We are satisfied the complainants can not sustain themselves by a reference to the acts of Vick. It remains to be ascertained, whether the dedication claimed has been made since his death, by his authority.

He appointed his wife executrix, and his son, Hartwell Vick, and nephew, Willis B. Vick, executors of his last will and testament. His wife died in a few minutes after him. Hartwell renounced, and Willis took out letters testamentary. The will contained a reservation of "two hundred acres, on the uppermost part of the uppermost tract, to be laid off into town lots, at the discretion of my executrix and executors." He also enjoined it on his executors, to "remember that the town lots now laid off in the afore-mentioned two hundred acres of land, should be sold to pay my just debts and other engagements, in preference to any other of my property, for the use and benefit of all my heirs." The only act of Willis B. Vick, bearing upon this matter, was an offer made by him to one of the witnesses, in reference to his taking some of the town lots in payment of a debt due from his testator. The offer was refused, and like a similar transaction with Newit Vick, was of no legal moment whatever.

We come next to the proceedings of John Lane. Can they be connected with any authority derived from Newit Vick? John Lane was appointed administrator with the will annexed, at the October term, 1821, of the probate court of Warren county. All his power was derived from that appointment. Was it legal?

The only authority of the probate court to grant letters of administration with the will annexed, is to be found in the special enactment of the statute: Turn. Dig., p. 443, sec. 27. It

is an express limited authority, and extends to two cases only: 1. Where the executor refuses to render an account. 2. Where he becomes insane. The section, of course, presupposes that the executor or executors have once qualified, and taken upon themselves the trusts of the will. After that, the jurisdiction of the court depends upon the two events contemplated in the statute, and is bounded by them. The record must show the jurisdiction, or it does not exist. It is the general principle applicable to all inferior tribunals. In this case the order granting letters to Lane was simply on his own motion, and without cause assigned. So far as the record shows anything, Willis B. Vick, the executor, was then acting in the discharge of the duties of his office. That fact is not material, however; the act appointing Lane does not state a case which gave the court jurisdiction, and it was therefore null and void. If the facts had been stated, their existence could not now be collaterally questioned, but a defect in jurisdiction may be noticed, whenever and wherever it appears: 6 Wheat. 128;¹ 8 Cranch, 21;² 9 Pick. 259;³ 2 Wils. 382;⁴ 1 Burr. 620;⁵ 1 Hayw. 414;⁶ 2 Pet. (S. C.) 164;⁷ 1 Co. 194,⁸ 268;⁹ 1 Willes, 199;¹⁰ 1 Saund. 313; 1 Stra. 703;¹¹ 2 Id. 102, 996.¹²

It is contended by counsel, that this defect is cured by the proceedings in evidence in the cause, showing that Willis B. Vick was removed from office by an order of the superior court of Warren county, in September, 1821, reversing a decree of the probate court previously made. Neither the probate court, nor the superior court of the county, had any direct authority to remove an executor for any cause. It was an incident to the power of appointment, which was exclusively delegated to the probate court. Certain acts were considered by the statute already referred to, as vacating the office of executor. There was no removal, except what was produced by the grant of the letters *cum testamento annexo*. This grant could alone come from the probate court, and, of course, any act of the superior court was without validity. The utmost the appellate tribunal could do, would be to reverse the decision of the inferior.

But even if it be admitted, that the removal, as an independent, and not an incidental act, might be made, it must still be for the same cause which would justify the appointment.

1. *Randolph v. Barbour.*

2. *Griffith v. Frasier.*

3. *Holyoke v. Haskins.*

4. *Perkin v. Proctor.*

5. *Hitchings v. Lewis.*

6. *Pearle v. Folsom.*

7. *Thompson v. Tolmie.*

8. *Overton v. Lackey.*

9. *Cherry v. Mann*; 8. C., 5 Am. Dec. 692.

10. *Ladbroke v. James.*

11. *Rea v. Rhodes.*

12. *Bush v. Baker.*

And here again the jurisdiction must appear. That is not the case in regard to the judgment by which Vick was supposed to have been removed. It could have no weight. It was void. Suppose it had appeared in the proceedings of the superior court, that the executor was removed for insanity, one of the causes named in the statute; still, unless that matter had been embodied in the records of the probate court, and made the foundation of the order appointing Lane, the grant to him would have been a nullity. The probate court is not authorized to exercise its jurisdiction on the mandate of any other court, but only on the very cases and facts set forth in the legislative enactments on the subject.

In this part of the case, we have given to the complainants the full benefit of the state of facts supposed by them; though it would be difficult to show their existence, by any examination of the confused and unintelligible entries of the inferior courts whose records have been under review.

It is unnecessary to notice particularly, the proceedings of Lane, in creating the easement claimed. They were ample for the purpose, if he had possessed the authority. The witnesses show clearly and beyond all question, that the first and only acts of dedication of the commons, were performed by Lane at his sale of lots, in 1822, under his fancied power as administrator. He did it solely in virtue of that power, and every one so understood it. He named the open space "commons," because "he thought it might as well be called by that as any other name," and not because it was a "commons," or had been made so by Newit Vick. He did not know the boundaries, direction, or limits of the supposed easement, although the pretended grantor had been dead more than two years, and he stood in the relation to him of a son-in-law. The testimony on this point is particularly full, and wholly rebuts any presumption of a dedication by Newit Vick, attempted to be drawn from his intentions, declarations, or acts.

It was said, however, that the doings of Lane will be sanctioned on a well-known principle in equity; because they were such as the executor would have been bound to perform, in the exercise of the discretion left to him by the will: 1 P. A. Browne,¹ 89.

The rule can not be carried to such an extent. It will, at most, only sanction the acts of an intruder upon a trust, where they are for the benefit of the trust fund, as in discharge of lia-

1. *Bradford's case.*

bilities, payment of debts of an estate, and the like. It will never permit a stranger to experiment upon the discretion confided to an executor, by creating incumbrances, and parceling out and selling real estate, and give validity to such proceedings on account of their supposed conformity to the wishes and designs of the testator. Heirs and devisees do not hold their rights by so feeble a tenure as this: Plowd. 282, 283; 6 Co. 30, b;¹ 1 Ld. Raym. 661;² 7 Serg. & R. 192;³ 4 Johns. Ch. 368.⁴

The last ground of complainant's claim, connected with Newit Vick, remains to be examined; and here it becomes important to notice several provisions of his will. It gave to his wife and children all his personal estate in equal shares; and made also a further provision for his wife. It then declares as follows: "I will and dispose to each of my daughters, one equal portion with my sons and wife, of all my personal estate, as they come of age, or marry, and to my sons one equal part of said personal estate, as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Wesley comes of the age of twenty-one years," etc. The clause of the will already quoted, in regard to the sale for the payment of debts, is the only other one to which it is necessary here to refer. It appears in evidence that Vick left nine daughters and four sons. John Henderson and Henry Morse, who had married daughters of Vick, petitioned the orphans' court (Nancy Vick joining with them) for a division of the town lots, and an assignment of their respective shares. They state no grounds, except in the brief allegation, that they are entitled by the will. John Lane voluntarily appeared and answered the petition; and on his application, plenary proceedings were ordered, "and the plaintiffs and defendant are directed to file their bill and answer at the next term of court." Accordingly, Morse and wife, and Henderson and wife, at the July term, presented their bill, setting out their claim a little more at large, complaining of the course of Lane, and praying an allotment and division according to the statutes, and offering to give bond to refund, if it should become necessary for the payment of debts. Lane's answer denies their right to a division, and states "his humble opinion to be, that it is a fair construction of the will, that the executors do sell the land, pay the debts out of the proceeds of such sale, and then distribute the balance among the children, heirs of Newit Vick." On argument and examination, the division was ordered, and

1. *Bothy's case*. 2. *Parker v. Kelt*. 3. *Nass v. Van Swearingen*. 4. *Berger v. Duff*.

Lane appealed to the court of chancery, where this decision was affirmed. Commissioners were thereupon appointed to make the allotment and division. Their report, with the plat annexed, was returned, and approved by the orphans' court. On this plat "Levee street" is left open as commons for the public, and this is the foundation of the claim to that portion of the easement.

The whole proceeding was based upon a wrong construction of the will. The daughters of Vick acquired no right by the devise to this land of their father. The clause from which their supposed interest arises, warrants no such inference. The sale of the town tract was only enjoined, in case it should be needed, for the payment of debts, etc. It was not an absolute direction to the executors to sell the land, but only to appropriate it in payment of debts, in preference to the personal estate. And this was considered to be for the benefit of all his heirs. One consideration renders this construction certain beyond all doubt. If Vick had died leaving no debts, there would not have been a shadow of authority in the will for selling any portion of the tract. And this was not an unreasonable provision, for he might have desired the town site to remain in the hands of those who bore his own name, and so have left it to his sons, and directed it to be kept together till Wesley Vick became of age. At the same time, as he had made provision for his daughters out of his personal estate, and reflecting that his debts might exhaust that entirely, his parental affection overcame his aspirations for fame, as the founder of a city, and he ordered the town property to be disposed of, rather than that his daughters should be deprived of the means of a comfortable subsistence. The orphans' court took a different view of the subject, and the inquiry is, whether the proceedings of the commissioners, acting under their authority, can bind these defendants. We think not. They were not parties to them. The petition and answer show, conclusively, that the contest was between Lane and the two heirs, who sought the assignment of their respective shares. They do not ask anything but the ascertainment of their own interests. Nor do they name or allude to any other heirs or devisees. It was their own claim they were pursuing against the administrator who denied it. They refer to the new code just then enacted, and propose to give a refunding bond, as directed by the ninety-first and ninety-second sections on page 56, Revised Code, when a single distributee or legatee obtains his distributive share. It assumed

the shape of a regular action in court, and the rules applicable to the one are applicable to the other. The parties concerned in it were bound and concluded by it, and no others: Rev. Code, p. 61, sec. 112.

These defendants were not only not parties to the contest, on the face of the pleadings, but they had no notice of it. Notice might perhaps have bound them, though their names did not appear in the petition or answer. It was said the act only required notice of the time and place of the meeting of the commissioners. The words of the section are certainly to that effect. But the first part of it declares the proceedings under it only conclusive on the parties concerned; by which we understand, persons before the court actually, or by return of process, or by publication. All such may properly be said to have had notice; or they may all come in, in the first instance, as petitioners, and this is probably the reason why the word notice is omitted in that portion of the sentence. Their interests are sufficiently guarded by providing that they shall not be affected unless they are concerned in the controversy. The other notice, directed in the proviso, is intended as a double protection, so that all whose rights may be involved, can attend, even at the comparatively unimportant matter of the surveying and running the lines of the different shares. In addition to this, the ninth section of the probate act, gives the power to the court, and of course enjoins the exercise of it, to summons and enforce the appearance of any person whose appearance in court shall be deemed necessary and proper for any purpose. That provision would, of itself, be conclusive on the matter.

The proceedings for the division of real estate under the direction of the probate court, are said to be proceedings *in rem*, and therefore binding on all the world. The designation will not alter the nature of the transaction. They are special, statutory proceedings, and must be governed wholly by the statutes authorizing them. Like the attachment law, or the general act in relation to partition of lands, they are wholly creatures of legislative enactment. But even in cases properly denominated suits, or actions *in rem*, the very reason why they are of such unlimited and universal obligation is, that all persons are supposed to have notice, and so may make themselves parties. This is by publication, citation, or monition in attachments, libels in admiralty, and the like. It is of no consequence what form of process, or summons, may be adopted or required. The legislature has a full right to give its own defi-

dition of notice, and when the lawful requisites appear, no citizen can deny the inference. If the inquiry could be extended beyond that point, and go to the fact of actual notice, it would in all cases require an examination into the capacity and degree of understanding in the party to be affected by it. For actual notice would most certainly depend rather upon the mental strength, information, and intellectual powers of the defendant, than upon the mere return of an officer upon a writ. This is not the principle, and we conceive, in the partition among heirs and devisees, the law requires notice to all who do not join in the petition, or they will not be bound by the acts of the court: 6 Wheat. 119. It is of infinitely more consequence, that all those interested in the subject-matter of the division, should be before the court ordering the allotment, than before the commissioners making it. For it is a well-established principle, that the court settles the rights and respective interests of the parties, in the first instance, and the freeholders appointed only act as ministerial officers, in laying off and ascertaining the boundaries of each share. It would be strange if the law had provided for that which was comparatively immaterial, and had left the transaction, which really fixes the whole matter, to be of an *ex parte* character: 1 Story Eq. 599; 17 Ves. Ch. 551.¹

Much reliance was placed on the confirmation by the supreme court, on appeal, of the decision of the probate court. The action of the appellate court did certainly settle the controversy between Lane and the appellees, Morse and Henderson. They can never question it further, but it gave no greater extent to the judgment of the inferior tribunal than it would have had if no appeal had been taken. It imparted to that judgment absolute verity and full force. That verity and force were confined to the parties to it, and these defendants were in no wise affected by it: 1 Cooke, 211,² 362.³

The acts of the commissioners, therefore, viewed in any light, can not avail the complainants in this controversy. It would require strong and undoubted authority to induce us to regard them as of any validity whatever. Here was a case in which the petitioners, Morse and Henderson, with their wives, on the one side, had not a particle of interest involved, as has been shown by the true construction of the will of Vick. The defendant to it, the pretended administrator, was alike a perfect stranger to the whole subject-matter before the court. The result was that the real estate of the appellants was parceled out

1. *Agar v. Fairfax*.2. *Henderson v. Robertson*.3. *Bush v. Williams*.

and divided, and an important portion of it, in perpetual use, was given away to the public. And this was brought about by an *ex parte* proceeding, begun and carried through by persons who had not a shadow of claim, legal or equitable, to the land appropriated. It would be a reproach to the law, if such a state of facts could find a sanction under its principles. We would not yield our judicial countenance to the doctrine contended for, unless compelled to do so by authority from which we could not dissent.

There is but one point remaining for our notice. “Has the dedication in question been made or sanctioned by the defendants?”

One of the defendants is still an infant, the other two came to the years of majority in 1827 and 1828. It is said they have recognized the dedication made by Lane and the commissioners. Those acts have been shown to be void, and of course, incapable of any recognition which could give them validity. Contracts and various other transactions, by an infant, which are voidable by reason of his nonage, may be ratified, and made operative by him, when he becomes of age. This is not prejudicial to him, and slight circumstances may be sufficient to bind him. Here the acts referred to are not anything done by the infants, but the proceedings of strangers in derogation of their rights: 3 P. Wms. 321;¹ 9 Pet. (S. C.) 607;² Matt. Pres. Ev. 241. Their real estate has been conveyed away by others, and if any recognition of theirs can protect the transaction, it must be such a recognition as amounts to a release on their part, or is equal to an original conveyance of the property in question. The record shows no such acts, but proves the contrary in the most satisfactory manner. In 1827, the probate court, on application, directed the division contemplated in the will of Newit Vick. This was the very year the oldest of the defendants came of age. The property in question fell under this division. In 1828, the claim of the three Vicks (defendants) had become, everywhere in that region, publicly known, and in that year, and the next, they conveyed away by deed, portions of the land in controversy. In the year 1831, legal proceedings were commenced for the recovery of the “commons,” and from that time to the present moment their efforts in court have never ceased.

It is said their various deeds, exhibited in proof, refer to the commons and boundaries on the plat of the town. That is a circumstance of no force when it is considered that their claim

1. *Pusey v. Desbouverie*.

2. *Owings v. Hull*.

was publicly known, and actually in process of litigation in the courts of the country. The plat was used merely for the purposes of description, and easy and familiar reference. It could not, under the circumstances, have any further effect. There have been no acts on the part of these defendants, on which to predicate any portion of the claim set up in the bill.

As to the character in which the claimants assume to act. They refer to the statutes, incorporating the town of Vicksburg, as investing them with the authority to protect and secure the interests of all the citizens. The first act, passed in 1825, is very vague, and it is by no means clear, that its terms would include any part of the commons or Levee street. The act of 1827 is distinct upon that head, and expressly adopts the plat returned to the probate court, by the commissioners in 1824. Among themselves the inhabitants of Vicksburg doubtless acquired an aggregate existence or character, by the statutes referred to. The enactments of the legislature did nothing, and could do nothing, to aid the inherent defect in their titles. With the exception of the single purchaser from Newit Vick, they all come upon the spot by virtue of the tortious proceedings of Lane and the commissioners. They were indeed an aggregate corporation, or body politic; but so far as these defendants are concerned, they held their position by act of disseisin, and intrusion upon their inheritance. From this point in the case, let us now look back to the supposed dedication by Newit Vick, and for a moment, consider it as actually having been made by him. How clearly and fully does it appear, that these complainants, thus situated, can never be considered the public, to whom the easement was granted. They can not connect themselves with the grantor, by any privity of contract, or mutual assent, so as to give any pretense of a right to be regarded as the favored objects of his bounty and regard. Their situation alone is a complete answer to their claim.

We have thus examined all the points deemed necessary to enable us to come to a conclusion on the appeal before us. We have given to the complainants the full benefit of all the testimony in the whole volume of the record, although a part of it was of an equivocal character, and some portions which were objected to, were probably inadmissible, according to the strict, technical rules on the subject. It has been all looked into and noticed, and although the facts of the cause are so different from any to be found in the books, that we should have felt warranted in deviating from some of the rules of adjudicated authority if it had been necessary, or even in estab-

lishing a new rule, founded upon the settled doctrines and analogies of law; yet our examination has been chiefly limited to a dry and rigid investigation of the reported decisions; and we are perfectly satisfied that the claim set up by the complainants, as against these defendants, has no foundation in law or equity.

It has been suggested that disastrous consequences might flow from a decision contrary to that made by the chancellor. We see no reason for any well-grounded apprehension on that score. At all events, such considerations can have no influence here. Judicially we can not regard them. Our duties begin and end with the case before us. Our vision is bounded by the record and the law.

We entertain no doubt that the decree of the chancery court should be reversed. We have, therefore, directed the injunction, originally granted in the cause, to be dissolved, and the bill dismissed at the cost of the appellees.

Decree accordingly.

In the case of *Lane v. Vick*, 3 How. (U. S.) 476, the principal case is thus referred to by Mr. Justice McLean, in delivering the opinion of the majority of the court: "It is insisted that the construction of this will has been conclusively settled by the supreme court of Mississippi, in the case of *Vick et al. v. The Mayor and Aldermen of Vicksburg*, 1 How. (Miss.) 379. The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds, within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say, that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes." And the supreme court of the United States, in that case, decided that it was evident from the will of N. Vick, that he did not intend to include the town lots in the devise of his lands to his sons; but that these lots must be sold, after the payment of debts, for the use and benefit of all the heirs of the testator. Mr. Justice McKinley delivered a dissenting opinion, concurred in by Chief Justice Taney, in which, referring to the principal case, he said: "I think this court was bound to follow the decision of that court upon the construction of the will." The principal case is also referred to in *New Orleans J. & G. N. R. R. Co. v. Moye*, 39 Miss. 387, as a case of dedication of urban easements to public use; in *Hart v. Burnett*, 15 Cal. 604, it is cited in connection with the case of *Lane v. Vick*, 3 How. (U. S.) 476; in *Kittle v. Pfeiffer*, 22 Cal. 490, to the point that a sale of lots by the owner, according to a map or plan of a city or town, on which streets, squares, and landings are marked out, is a dedication to public use.

DEDICATION OF LAND TO PUBLIC USE: See *Le Clercq v. Trustees of Galipolis*, 28 Am. Dec. 641, note 644; *State v. Trask*, 27 Id. 554, note 559, where the subject is discussed at length; *Brown v. Manning*, Id. 255; *Trustees of Watertown v. Cowen*, Id. 80; *Rung v. Shoneberger*, 26 Id. 95, note 101; *State v. Catlin*, 23 Id. 230; *Abbott v. Mills*, Id. 222, note 230; *Pomeroy v. Mills*, Id. 207; *Livingston v. Mayor etc. of New York*, 22 Id. 622.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

SHROPSHIRE v. GLASCOCK.

[4 MISSOURI, 536.]

HORSE-RACING IS A GAME, within the meaning of the statute of this state to restrain gaming.

BOND GIVEN FOR MONEY WON AT HORSE-RACING, or to secure a forfeiture for failure to run a horse-race, is void.

DEBT on a bond from the circuit court of Marion county.
The opinion states the case.

Wright, for the appellant.

Chambers and Anderson, for the appellees.

By Court, **McGIRK, J.** Shropshire brought an action of debt on a bond, against Glascock and Garner, for two hundred and fifty dollars in the circuit court of Marion county. The defendants appeared and pleaded several pleas. The fourth plea asserts that the parties agreed to run a horse-race for five hundred dollars; and that it was further agreed, that in case either should fail to run said race, then he should forfeit to the other the sum of two hundred and fifty dollars; and that to secure said forfeiture, the bond in question was made and delivered to Shropshire—wherefore, they pray judgment, etc. This plea was demurred to, the demurrer was overruled, and judgment given for the defendants. The only question made by the record, is, whether horse-racing is prohibited by the statute of the state. By the act of the general assembly, passed 1825—see Revised Laws of 1825, 409, it is enacted, “That all promises, notes, bills, bonds, etc., made or entered into by any person,

where the whole or any part of the consideration thereof, shall be for money, etc., won by gaming, or playing at cards, dice, or any game or games, shall be void and of no effect."

The defendants, by Mr. Anderson, contend, that the words, "won by gaming, or playing at cards, dice, or any other game or games," include a horse-race. That horse-racing is as much, by reason of these general words, prohibited, as if expressly named in the act; and that this bond, resting on a consideration contrary to the policy of the law, is therefore void.

Mr. Wright, for the plaintiff, contends that the words "other games or games" are only intended to embrace games of like kind, with cards and dice; and that games of the turf are not intended to be embraced by the act. We are not satisfied that this construction of the act is correct. What game would be of such like kind as to correspond with this construction, we can not exactly undertake to say. All those games that require a shelter, a house, a deep cellar, or dark place, to be successfully performed, are alike, or are of like kind in the place; but in many, the principles of the games may be essentially different from each other. We therefore say, as this construction only makes the meaning of the act more obscure than the act would seem to be without it, it can not be the true one. The words of the act are very peculiar. It declares all bonds are void where the consideration thereof, shall be money won by gaming. When these words are used, the sense is complete; and if the statute had said nothing more, it may be safely affirmed, there would have been no doubt that money won by horse-racing is money won by gaming. The words "or playing at cards or dice," seem to create the ground for the argument of counsel. We think these words are to be understood as synonymous. Why the legislature specified any instruments at all, by which games are played, we only attribute to the carelessness generally prevalent in all such bodies, with regard to the choice of words. The fact that the legislature intended to use general words, sufficient to embrace all modes of gaming, is made more evident, when we look at the words used together, after the words "or playing at cards, or dice." For then they say, "or any other game or games," intending again, to prohibit all fashions and modes of gaming.

By the statute 22 Charles II., gaming of many sorts was forbidden, and horse-racing was expressly mentioned also: but this statute did not make contracts, etc., where the consideration was money won by gaming, void. By the statute 9 Anne,

the parliament again enacted, "That all notes, bonds, etc., made, etc., where the consideration of the same shall be money won by gaming, or playing at cards, dice, tables, tennis, bowls, or any other game or games whatsoever, shall be void:" 3 Bac. 337, 338. The judges of England have determined that a horse-race is within this statute: See *Lyndell v. Longbottom*,¹ 2 Wils. 36; *Goodburn v. Marley*, 2 Stra. 1159. We have looked into these cases, and find the English judges made their decisions expressly on the words, "other game or games whatever." These cases present a good judicial interpretation of the words of our statute. We are therefore, well satisfied, that a bond given for money won at horse-racing, is void; and that a bond given to secure the payment of a forfeiture is a contract against the policy of the law, and therefore void also.

Judgment affirmed, with costs.

Cited and approved in *Boynton v. Curle*, 4 Mo. 599; in *Hayden v. Little*, 35 Id. 422; and in *Tatman v. Strader*, 23 Ill. 495. Distinguished in *State v. Hayden*, 31 Mo. 35.

NOTES GIVEN FOR GAMING CONSIDERATION, WHEN VOID: See note to *Jones v. Sevier*, 13 Am. Dec. 220.

CHOUTEAU v. RUSSELL.

[4 MISSOURI, 553.]

WHERE PURCHASER OF LAND AGREES TO PAY THE PURCHASE MONEY, upon the vendor's delivering to him United States patents therefor, such vendor can not enforce payment, before performing the condition precedent, although congress may, subsequently to the making of the agreement, have passed an act which rendered the delivery of such patents unnecessary or impracticable.

ERROR to the circuit court of St. Louis county. The opinion states the case.

Gamble, for the plaintiff in error.

Geyer, for the defendant in error.

By Court, TOMPKINS, J. This was an action of covenant, brought by Chouteau in the circuit court of St. Louis county, against Russell. That court gave judgment for Russell, and to reverse that judgment, Chouteau brings up the case by writ of error.

The declaration states that Russell, on the thirtieth day of

1. *Lynall v. Longbottom*.

December, in the year 1829, made his deed poll; whereby he promised to pay to the plaintiff, two years after the date thereof, or so soon afterwards, and not before, as the said plaintiff should deliver to the said Russell the patents from the United States, for two tracts of land, conveyed on the day of the date of the said deed poll by the said plaintiff to the said defendant, the just and full sum of two thousand dollars, with interest at the rate of six per cent. a year, from and after, but not before, the said two land patents should be delivered to the defendant.

The plaintiff then avers, that the said two tracts of land in the said deed poll mentioned are two out lots adjoining the town of St. Louis, the titles to which were confirmed by the first section of the act of congress entitled, "An act making further provision for settling the claims to land in the territory of Missouri," passed the thirteenth day of June, in the year 1812; and that after the making of the said deed poll, and before the expiration of two years after the date of the said deed poll, to wit, on the twenty-seventh day of January, in the year 1831, a certain act of congress was passed, whereby it was enacted by the senate and house of representatives in congress assembled, that the United States did thereby relinquish to the inhabitants of the several towns and villages of Portage de Sioux, St. Charles, St. Louis, etc., in the state of Missouri, all the right, title, and interest of the United States in and to the town or village lots, common field lots, and commons, in and adjoining and belonging to the said towns or villages, confirmed to them respectively by the first section of the act of congress entitled, "An act making further provision for settling the claims to land in the territory of Missouri, passed thirteenth June, 1812." To be held by the inhabitants of the said towns and villages in full property, according to their several rights therein—to be regulated or disposed of for the use of the inhabitants, according to the laws of the state of Missouri. The plaintiff further averred, that from the passage of the said act of congress, on the said twenty-seventh day of January, in the year 1831, and from thence hitherto, the United States have not issued, and will not issue, patents for any town or village lots, out lots, etc., so relinquished by the United States, as provided in the last-mentioned act of congress; the plaintiff further avers, that he has been prevented from obtaining the patents from the United States for the two tracts of land in the said deed poll mentioned, by the passage of the said act of congress, on the said twenty-seventh day of January, in the year 1831.

The defendant pleaded in bar, that the plaintiff did not, any time before the commencement of this suit, deliver to him the patents from the United States for the two tracts of land, which the plaintiff had sold to him on the day of the date of the said deed poll. To this plea of the defendant, the plaintiff demurred. The circuit court gave judgment on the demurrer, for the defendant.

For the appellant, it is contended that the patents have been rendered unnecessary by the act of congress, and the non-performance of his contract will be excused. And he cites *Pearl's Heirs v. Taylor's Devises*, 2 Bibb, 561.

The appellee contends, that the act of congress did not render the performance of the condition precedent impossible, nor change the rights or obligations of the parties. The case of *Pearl's Heirs v. Taylor's Devises* was this, Pearl employed Taylor at his own proper cost and charge, to survey, plat, and patent two thousand acres of land; to clear lands, build houses, plant orchards, and to do everything to save and secure the land, according to the king's proclamation and the colonization act; and after Taylor had surveyed, platted, and patented the said land, and given sufficient security for the faithful performance of the latter, he was to make him a fee-simple deed to seven hundred acres of the said lands. Taylor, in the year 1774, executed the survey in Kentucky, on said warrant. In the year he was killed by the Indians, in Kentucky; but the surveys executed by him were returned to the surveyor's office by those who were of his company, and upon one of those surveys a patent issued for two thousand acres, a part of which is the subject of the present controversy. The court say, "by the contract, it seems that Taylor was bound to clear lands, build houses, plant orchards, and to do everything necessary to save and secure the land, according to the king's proclamation and the colonization act." If those stipulations were required for the purpose, also, of adding value to the land, they must certainly deserve great weight in the present contest; but how much land, what description of houses, or what sort or number of fruit trees were to be cleared, made, and planted? The whole is left uncertain with regard to a supposed or definite value of the land. But to this inquiry a measure is presented, which seems at once to evince the then object of that provision in the contracts: it was to save and secure the land; without this, the residue is totally uncertain in its extent or value, and could therefore, form no substantial or essential part of the agreement. But the land seems to be safe

and secure to Peart and his heirs, from the act, the labor, blood, and money of Taylor; and shall they, against the great and leading objects of that contract, be permitted to ward off their claim upon trivial or more nominal pretenses? Equity and good conscience forbid it.

But how stands the present case? Does the last act of congress, viz., that of 1831, make the appellee's title any better than that of 1812? He bargained to pay his money when patents should be delivered to him for the very land, and not before. He wished a patent to prove himself entitled to the very spot, and he is told that the act of congress will answer his purpose as well, and he must pay the money; and that the United States will grant no more patents. Whether the act of congress will answer his purpose as well as a patent, is not so very obvious; but if it were better than the patent, as that is the very thing bargained for by both parties, it seems hard to tell the appellee he shall take some other thing. In the case cited from Bibb, everything essential was done by the petitioner. Here, the only thing the plaintiff contracted to do was left undone. If in fine, he shall be unable to procure a patent, he must seek some other relief, or must seek it in another form. A court of chancery might decree that the contract for the sale of the land be rescinded, unless the money were paid, which was the consideration of the sale. It is my opinion that the judgment of the circuit court ought to be affirmed, and the presiding judge concurring with me in that opinion, it is affirmed.

McGIRK, J. I concur in the foregoing opinion, and the judgment is affirmed.

IN CASE OF MUTUAL COVENANTS, neither party can enforce the contract against the other without showing performance, or tender of performance, on his own part: *Cassell v. Cooke*, 11 Am. Dec. 610, note 623; *Dearth v. Williamson*, 7 Id. 652.

WILSON v. WOODRUFF.

[5 MISSOURI, 40.]

ANSWER TO BILL OF DISCOVERY, WHEN EVASIVE AND INSUFFICIENT.—Where a bill of discovery alleges that no consideration was given by the defendant for the property in dispute, an answer which merely alleges that a consideration was paid, without stating whose money it was, or by or for whom it was paid, is evasive, and exceptions thereto should be sustained.

WHERE VENDOR AFTER SALE DECLARES THAT HE HAS SOLD TO VENDEE, evidence of other declarations by him, contradictory of the former, and made at another time, and out of the presence of the vendee, is not admissible.

DETINUE. The opinion states the case.

Wilson, for the appellant.

Clark, for the appellee.

MCGIRK, J. Wilson brought an action of detinue against Woodruff, for a negro woman. The defendant appeared and pleaded *non detinet*, property in himself, etc. Whereon the cause was continued to the next term of the court. At the next term of the court, and before the trial came on, the plaintiff, in pursuance of the statute, filed a bill of discovery, by which he alleged that the defendant had in reality no title to the slave, but pretended to have a bill of sale, and to have paid two hundred dollars for the slave. The bill also alleges that it was well understood and agreed between the intestate and the defendant that the title should not pass, but that the title should still remain in Owen, and Woodruff should have the possession, and should seem to the public to have the title. The bill alleges that not one cent of money was ever paid by Woodruff to Owen for the slave; prays a discovery, etc. The defendant filed his answer; and to this answer the plaintiff excepted, and the court overruled the same.

I can not discover that the defendant failed to answer anything as he should have done, except one thing, which is this: the plaintiff alleges the defendant never paid one cent for the slave. The defendant's answer to this is, not that he paid the price of the negro to Owen, with his money, which was the thing sought after, but that the money was paid without saying for whom, or by whom, or whose money the same was. In this particular, I deem the answer evasive, and I am of opinion the court erred in overruling the exceptions.

The plaintiff then filed an amended bill of discovery, which the court refused to receive. This is also complained of as error. It is argued by Mr. Clark, for the defendant, that this bill came too late. Whether the court erred in refusing this bill I am not satisfied; enough does not appear on the record to satisfy me the court erred.

The plaintiff went to trial. A verdict and judgment were rendered against him. On the trial, it was proved that the slave formerly belonged to Woodruff; that he sold her to one Isaacs,

and that Isaacs sold her to Owen. The defendant gave in evidence that after the slave went into possession of Woodruff, and before the death of Owen, Owen declared and said he had sold the slave to the defendant. The plaintiff then offered to prove that, at another time, when Woodruff was not present, Owen said he had not sold the slave to the defendant. This evidence was rejected. The plaintiff complains that in rejecting this evidence the court erred. To prove the circuit court erred, Mr. Wilson cites and relies on the case of *Nowlin v. Foster*, 1 Semi-annual part Mo. Decisions, 18. As this case has been relied on, and has been cited at bar several times in other cases, I will give some attention to the case. The case has been relied on in the argument now before the court, and in several other cases, to prove that when evidence is given that the vendor after a sale says he has sold the property, that if at another time out of the presence of the vendee he declares that he has not sold the same, the latter declaration may be given in evidence to contradict the former. I apprehend the case of *Foster v. Nowlin* does not settle the law to be so. I take the rule to be that what a man says against his interest is good evidence against him, and that all he says at the time, by way of explanation, or even denial, is to be taken with his admissions together. But that what he says at another time (unless the adversary be present), affirming his interest, is no evidence for him. I will examine the case above cited, and will show that in that case the court did not contradict this rule.

In that case the question was whether certain property belonged to one Simmons, against whom judgment had been obtained, or to Foster, who claimed the same, notwithstanding the possession had always remained with Simmons. The Fosters, who claimed the property as theirs, notwithstanding the possession never had been in them, but had always been in Simmons, proved that Simmons said, while he had the possession and use of the property, it was not his. The plaintiff, Nowlin, who asserted that the property was Simmons', and who was seeking to make it pay Simmons' debt to him, objected to this evidence, but the court let the evidence go. If this decision were erroneous, Nowlin could not then reverse it, nor was it safe for him to let it pass without rebutting it; and for this purpose he proved that while Simmons was yet in possession, he declared the property was his. On this point the court said the after declaration of Simmons, made by him while he was

in possession of the property, was evidence to show how he viewed the title, or rather, to show the nature of the possession. Now in that case, both parties claimed under Simmons, and as Foster had given evidence to show how Simmons esteemed his possession at one time, it was but right that the other party should show that at another time he viewed it differently; and this was fair rebutting evidence in that case. The mistake of counsel, as I apprehend, exists in supposing this court approve of the admission of Simmons' first declarations. I think it is not certain but that the court did err, but the evidence having been let in, it was right to rebut it by after declarations of Simmons. The case of *Nowlin v. Foster* was a case where a person, claiming to be vendee, gave in evidence the declarations of his supposed vendor, after the sale, in affirmance of the vendee's title. Now this could not be lawfully done, unless, indeed, the fact of the vendee's remaining and being in possession when the declarations are made forms a just reason why it should be so. The question in the case at bar is not like the case of *Nowlin v. Foster*.

I am clearly of opinion there was no error on this point, but for the first error above stated, the judgment is reversed and remanded.

Cited in *Turner v. Belden*, 9 Mo. 794, in which the court, referring to the principal case, say that the court, in the latter case, "concede that the testimony could only be supported as rebutting evidence;" and in *Hambricht v. Brockman*, 59 Id. 58, to the point that declarations touching land titles are not admissible when used to establish the title of the witness or to impair the title of others who are not shown to have been present or in complicity.

BILL OF DISCOVERY, ANSWER TO.—Plaintiff is entitled to a full answer as to every material allegation of his bill: *Price v. Tyson*, 22 Am. Dec. 293.

ADMISSIBILITY OF DECLARATIONS OF VENDOR IN ABSENCE OF VENDEE: See *Martin v. Reeves*, 15 Am. Dec. 154; *Barrett v. French*, 6 Id. 241, note 244; *Reichart v. Castator*, Id. 402, note 406; *Dorsey v. Dorsey*, Id. 506, note 509.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

STODDARD WOOLEN MANUFACTORY v. HUNTLEY.

[8 NEW HAMPSHIRE, 441.]

LIEN IS WAIVED BY AGREEMENT TO GIVE CREDIT, or to receive payment in a particular mode inconsistent with the existence of a lien.

NO LIEN EXISTS UPON GOODS REMAINING in hands of a party when the time of payment arrives, in a case where a credit has once been given.

TROVER for an alleged conversion of cloth. The action was, by agreement, submitted to referees, who reported that the defendant agreed with the plaintiffs' agent to dress the cloth and deliver it as it was finished; and the agent agreed to pay him for the dressing once in three months. The defendant declined to deliver to the plaintiffs two bales which he had in his possession, finished, but for which he had not been paid. The referees, believing the law to be with the plaintiffs, made a report in their favor.

Chamberlain, for the plaintiffs.

Wilson, for the defendant.

PARKER, J. The question, to be settled in this case, is, whether the defendant had a lien upon the goods in his hands at the time of the demand, and thus a right to hold them until he was paid for the work and labor bestowed upon them, or whether, by agreeing to receive his pay quarterly, he had waived the right to insist upon such lien. No question is made, but that the defendant would have had a right to retain the goods for his pay, had he contracted generally to do the labor without time stated for payments. An agreement for the price

does not discharge a lien: *Metc. Yelv.* 67,¹ note; *Hutton v. Bragg*, 7 Taunt. 14, *per* Gibbs, C. J.; 4 Camp. 150,² note.

The general principle is that an agreement to give credit, or a special contract, for a particular mode of payment, inconsistent with a lien, is a waiver of it: *Metc. Yelv.* 67, in note; *Raitt v. Mitchell*, 4 Camp. 146; *Cowell v. Simpson*, 16 Ves. 280; *Chandler v. Belden*, 18 Johns. 157 [9 Am. Dec. 193]; *Hutchins v. Olcutt*, 4 Vt. 549 [24 Am. Dec. 634]; 4 Wend. 296.³

The operation of a lien is to place the property in pledge for the payment of the debt; and where the party agrees to give time of payment, or agrees to receive payment in a particular mode, inconsistent with the existence of such a pledge, it is evidence, if nothing appears to the contrary, that he did not intend to rely upon the pledge of the goods, in relation to which the debt arose, to secure the payment.

In this case the defendant contracted to dress the flannels, and to receive his pay quarterly—but the flannels, as fast as they were dressed, were to be delivered to the plaintiffs, whenever they called. This was the legal effect of the contract, and the mode pursued by the parties. As to all the flannels, then, which were demanded by the plaintiffs within each quarter, no lien could attach, because the plaintiffs had a right to receive them as soon as dressed, while the price of the defendant's labor upon them would not be due until the expiration of the quarter. Had these flannels been demanded prior to the eleventh of December, the defendant could have had no claim to retain them as a pledge for the payment, for there would have been a present duty to deliver, while the time of payment had not arrived: 18 Johns. 162.⁴

If, then, the defendant can sustain a defense, it must be because the flannels now in question were not demanded before the expiration of the quarter, and remained in his hands until payment became due. But we think this circumstance can not alter the case. If such defense was maintained, it must be upon the ground that by the original contract the defendant had a conditional lien, depending upon the accidental circumstance whether any of the goods might happen to be in his hands at the expiration of a quarter, or upon the ground that, although the contract to give credit, and receive payment quarterly, was in the first instance a waiver of the lien, yet, when, at the expiration of the quarter, goods remained in his hands, the lien revived or attached upon such goods.

1. *The Hostler's case.*

2. *Raitt v. Mitchell.*

3. *Moore v. Hitchcock.*

4. *Chandler v. Belden.*

We find nothing to justify us in supporting a lien upon either ground. There is nothing in the contract itself to show that the parties contemplated any conditional lien, nor anything in the cases to support a lien dependent upon the accidental circumstance of goods remaining in the possession of a party when the time of payment arrives, where a credit has once been given. Judgment for the plaintiffs.

RIGHT OF LIEN ORDINARILY ACCOMPANYING IMPLIED CONTRACT does not exist whenever there is an antecedent contract inconsistent with the existence of such right: *Hutchins v. Olcutt*, 24 Am. Dec. 634.

NO LIEN IS IMPLIED BY LAW where the business is done under a personal contract: *Cummings v. Harris*, 23 Id. 206.

GIBSON v. BROOKWAY.

[8 NEW HAMPSHIRE, 465.]

PLEA OF NUL DISSEISIN ADMITS that the tenant has disseised the demandant. DESCRIPTION IN CONVEYANCE, EFFECT OF.—A description in a conveyance, in these words: "A certain tenement, to wit, one half of a corn-mill, situated in Washington, in lot No. 1, with all the privileges thereto belonging," is sufficient to pass the mill, the land on which it stands, and such water privileges as are necessary to the use of the mill.

PLEA of land. Defendant pleaded *nul disseisin*. It was admitted that Joseph Bailey was the original owner of the premises. The plaintiff offered a deed from Bailey to one Graves, in which the premises were conveyed by the description stated in the opinion; and a deed from Graves to the plaintiff. A verdict was taken, by agreement, for the defendant, subject to be set aside and a verdict entered for the plaintiff

Handerson, for the plaintiff.

Hubbard and Gilchrist, for the defendants.

By Court, UPHAM, J. An exception was taken on trial, that there was no evidence of a disseisin by the defendant; but the general issue which is pleaded in this case is a denial of record of the plaintiff's right to recover any part or parcel of the premises, so that the pleadings are fatal to this exception.

The only question to be determined in the case, is whether the deed under which the plaintiff claims, passes the buildings merely, or the land on which the same were situated, with such adjoining land as may be essential for their use and improvement. Conveyances are most usually by metes and bounds of

land, with the additional description, where buildings are upon the premises, of the phrase, "with the buildings thereon;" but this addition is immaterial. A conveyance of the land passes the buildings, of course.

But land will also pass by other terms of description. Thus a conveyance of a messuage, a rectory, a house, etc., will in many instances convey land. In *Shep. Touch.* 94, it is said that "the grant of a messuage, or a messuage with the appurtenances, passes the house and building adjoining, together with the close upon which the dwelling-house is built, and the little garden, yard, field, or piece of void ground lying near, and belonging to the messuage. And so much also may pass by the grant of a house." Coke says: "By the grant of a messuage, or house, the orchard, garden, and curtilage do pass, and so an acre or more may pass by the name of a house:" *Co. Lit.* 216. The grant of a cottage will pass a little dwelling-house, that has no land belonging to it: *Shep. Touch.* 91. A cottage is a little house without land: *Co. Lit.* 216.

In *Doe v. Collins*, 2 T. R. 499, a devise "of the house I live in, and garden to B.," was held to include the stables, and the land on which they stood, and a coal pen which was on the opposite side of the way, and separated by the road. Ashhurst, J., said: "The distinction betwixt a house and a messuage seems to be too subtle to be relied upon at this time; for he thought whatever would pass by the one would pass equally by the other." See, also, *Smith v. Martin*, 2 Saund. 401, and authorities there cited.

Blake et al. v. Clark, 6 Greenl. 436, is a case directly in point. It was there holden that the conveyance of a saw-mill conveyed the fee of the land on which the mill stood, and that the land on which a mill stands may be regarded as including land over and upon which the slip, if it has one, or any other necessary projection from the mill, passes, and that the term may also embrace the free use of the head of water existing at the time of the conveyance, as also a right of way, or any other easement which has been used with the mill, and which is necessary to its enjoyment.

We are of opinion that the description in the plaintiff's deed must go to this extent at least. The terms used in the conveyance here are much stronger than those in the case last cited. Tenement is a large word to pass not only lands, and other inheritances which are holden, but also offices, rents, commons, and profits arising from lands: 1 *Co. Lit.* 219; *Shep. Touch.*

91. With us the word tenement is applied exclusively to land, or what is usually denominated real property: Stearns on Real Actions, 150. The description used in the conveyance in this case, is: "A certain tenement, to wit: one half of a corn-mill, situated in Washington, in the county of Cheshire, in lot No. 1, and second division, with all the privileges thereto belonging, the same as I now possess." The design was, without doubt, to pass, under the phrase, "a certain tenement, being one half of a corn-mill," the land on which the same was situated, together with that portion of the water privilege which was essential to the use of the mill; and such is the proper legal effect of the terms made use of.

Independent of the word tenement, there is sufficient in this description to convey the land connected with the mill. The term messuage, house, and mill, will often include land, if not necessarily so, unless there is something in the conveyance to rebut such a presumption. In this case each portion of the description corroborates the construction we give to it, and makes it an undoubted conveyance of land and buildings. The verdict must, therefore, be set aside and

Judgment rendered for the plaintiff.

Cited and approved in *Sparks v. Hess*, 15 Cal. 198, and in *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 188, as to the effect of the description in the conveyance.

DAVIS v. BELL.

[8 NEW HAMPSHIRE, 500.]

INVENTOR, TO ENTITLE HIMSELF TO A PATENT, must give, in his specification, a true description of his invention, and state clearly and accurately what he claims as his invention.

AMBIGUITY IN ANY MATERIAL PART of such description will render the patent void.

SPECIFICATION MUST STATE what is new and what is old, in such a manner as to show clearly what is claimed as a new invention, and if it seeks to cover more than is new, the patent will be void.

ASSUMPT, upon the following contract:

"For value received, we promise N. T. Davis, to pay him one hundred and fifty dollars by September 1, 1833, with interest after April, 1833, at our store in Haverhill, on condition that said Davis' conveyance to us of Shove & Hunt's patent right shall approve itself as good in all respects as said Davis' cov-

enants, in his deed of conveyance of this date, have represented it.

“ December 27, 1832.

J. & J. BELL.”

On the trial it was admitted that the defendants made the contract, and that the consideration for their promise therein was the conveyance to them of the right to make, use, and vend the improvement in the art of tanning leather, for which letters patent were issued to Shove & Hunt in 1828. The deed by which the right was conveyed contained a covenant that the improvement was an original invention of Shove & Hunt, for which they were entitled to letters patent. The substance of the specification filed by Shove & Hunt in the United States patent office, is given in the opinion. It appeared further that a mode of taking the hair from hides by sweating, had been known in England, long before the alleged discovery of Shove & Hunt. A verdict was taken for the plaintiff, subject to the opinion of this court.

Rogers, for the plaintiff.

Bell, for the defendants.

By Court, RICHARDSON, C. J. The invention of the patentees in this case is stated in the specification to be an improvement in tanning and manufacturing hides into leather, which consists in a process of working off the hair with greater facility and with more safety than in any other mode of sweating. This process is thus described in the specification: “ Hang or suspend the hides singly by one edge, in a tight place, vat, or pit, prepared for the purpose, occasionally changing them edge for edge, after a day or two. A small opening, or vacancy, should be left in each end of the place, vat, or pit. When there are indications of too much heat, care must be taken to drench the hides with cold water.”

Now all this is stated in the specification to be the invention of the patentees. But it is very certain that a process of taking hair from hides, by hanging them in a close room, was well known in England long before this patent was granted. And a close room may very well be understood to be “ a place,” within the meaning of the specification in this case. The only things that are new in the process of these patentees are the hanging of the hides by the edge, occasionally changing them edge for edge, the holes in the end of the place, for carrying off the warm air, and the drenching the hides with cold

water. For aught that appears, these may be new things in the process. But the hanging of the hides in a tight place for the purpose of taking off the hair, is certainly not a new discovery. This specification is then broader than the invention; and the patent covers matter for which the patentees were not entitled to the protection of a patent.

The third section of the statute of the United States, passed on the twenty-first of February, 1793, under which this patent was granted, provides that every inventor, before he can receive a patent, shall deliver a written description of his invention, and of the manner of using or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known.

An inventor, in order to entitle himself to a patent, must give in his specification a true description of his invention, or improvement, and state clearly and accurately what he claims as his invention; and if there be any ambiguity in any material part of the description, the patent is void: *Bloxam v. Elsee*, 6 Barn. & Cress. 169; *Felton v. Greaves*, 3 Car. & P. 611; *Savory v. Price*, 1 Ry. & M. 1; *Hullett v. Hague*, 2 Barn. & Adol. 370; *Turner v. Winter*, 1 T. R. 602.

And it is well settled, that the specification must state what is new and what is old, in such a manner that it may clearly appear what is claimed as a new discovery or invention; and if it seeks to cover more than is new, the patent is void: *MacFarlane v. Price*, 1 Stark. N. P. C. 199; 2 H. Bl. 488;¹ *Hornblower v. Boulton*, 8 T. R. 95; *Lowell v. Trevis*, 1 Mason, 182; *Woodcock v. Parker*, 1 Gall. 438; *Odiorne v. Winkley*, 2 Id. 51; *Moody v. Fiske*, 2 Mason, 112; *Hill v. Thompson*, 3 Meriv. 622; *Campion v. Benyon*, 3 Brod. & B. 5.

The patent in this case is, then, void; and by the express terms of the contract on which this action is founded, the plaintiff is not entitled to the money he seeks to recover. We are, therefore, of opinion that the verdict be set aside, and

A new trial granted.

PATENTS—SPECIFICATION, WHAT TO CONTAIN.—A patentee of an invention must give, in his specification, a sufficiently clear, full, and accurate description to enable one skilled in the art to which it pertains to make and use the invention: *Lippincott v. Kelly*, 1 West. L. J. 513; *Wilbur v. Beecher*, 2 Blatchf. 132; S. C., 1 Fish. Pat. 401; *Hogg v. Emerson*, 11 How. (U. S.) 587, 606; *Smith v. Ely*, 5 McLean, 76; S. C., 1 Fish. Pat. 339; Curt. Law Pat., sec. 219 *et seq.* And in a patent for composition of matter, the description in the specification must be so complete as to enable a person skilled in the particu-

1. *Boulton v. Bull*.

lar art to apply and use the invention, without making any experiment of his own: *Wood v. Underhill*, 5 How. (U. S.) 1, 5; *Jenkins v. Walker*, 5 Fish. Pat. Cas. 347. It is not enough that some very skillful artisans could make and use the invention, but persons of ordinary skill must be able to construct it, and apply it to a useful purpose: *Hogg v. Emerson*, 11 How. (U. S.) 606; *Lippincott v. Kelly*, 1 West. L. J. 513.

THE REASONS FOR REQUIRING CERTAINTY OF DESCRIPTION in the specification of a patent are: 1. That others may avoid infringing the patentee's right; and, 2. That the public may have the benefit of the discovery by referring to the specification itself, after the expiration of the patentee's monopoly: *Dixon v. Moyer*, 4 Wash. C. C. 68; *Judson v. Moore*, 1 Fish. Pat. Cas. 544; *Wayne v. Holmes*, 2 Id. 20; *Brooks v. Jenkins*, 3 McLean, 432, 441; S. C., 1 Fish. Pat. 41; *Parker v. Stiles*, 5 McLean, 44; S. C., 1 Fish. Pat. 319; Curt. Law Pat., sec. 228.

NEW MUST BE DISTINGUISHED FROM OLD.—Where a patentee seeks a patent for an improvement only upon some existing machine or invention, he is bound to distinguish in his specification, what is new and what is old, so that it may clearly appear for what the patent is granted: Curt. Law Pat., sec. 232; *Lowell v. Price*, 1 Mason, 182, 187; *Phillips v. Page*, 24 How. (U. S.) 164; *Hovey v. Stevens*, 3 Woodb. & M. 17, 27; *Brooks v. Jenkins*, 3 McLean, 432; S. C., 1 Fish. Pat. 41; *Wintermute v. Redington*, 1 Fish. Pat. Cas. 239; *Goodyear v. The Railroad*, 2 Wall. jun. 356, 365; *Dixon v. Moyer*, 4 Wash. C. C. 68; *Davoll v. Brown*, 1 Woodb. & M. 57; *Carr v. Price*, 4 Blatchf. 200. Mr. Justice Story, in discussing this subject in *Lowell v. Price*, *supra*, said: "The patentee is clearly not entitled to include in his patent the exclusive use of any machinery already known; and if he does, his patent will be broader than his invention, and consequently void. If, therefore, the description in the patent mixes up the old and the new, does not distinctly ascertain for which, in particular, the patent is claimed, it must be void; since if it covers the whole, it covers too much, and if not intended to cover the whole, it is impossible for the court to say, what, in particular, is covered as a new invention." The specification must, therefore, point out the new improvement and show in what it consists. And it will not suffice to show what it is, on the trial, by exhibiting the invention, or by extraneous evidence: *Dixon v. Moyer*, 4 Wash. C. C. 68; *Davoll v. Brown*, 1 Woodb. & M. 57; *Brooks v. Jenkins*, 3 McLean, 432, 444; S. C., 1 Fish. Pat. 41. If the specification does not describe the invention so as to show in what respects the invention or improvement differs from what had been before known or used, the patent is void: *Langdon v. De Groot*, 1 Paine, 203, 217. When it can be done, it is safest to describe the invention previously in use, in order that it may be clearly seen in what the improvement claimed consists: *Sullivan v. Redfield*, 1 Id. 441, 451. But when the old is well known it need not be fully described, but may be referred to in general terms: *Many v. Jagger*, 1 Blatchf. 372; S. C., 1 Fish. Pat. 222; *Emerson v. Hogg*, 2 Blatchf. 1, 9. And, as the object to be attained by describing the old machine is to make clear in what the new improvement consists, wherever this object can be attained without describing the old, such description may be dispensed with: *Harmon v. Bird*, 22 Wend. 113; *Brooks v. Jenkins*, 3 McLean, 432, 444; S. C., 1 Fish. Pat. 41; *Evans v. Eaton*, 7 Wheat. 356, 434; *Sullivan v. Redfield*, 1 Paine, 441; *Wyeth v. Stone*, 1 Story, 273, 286.

PATENTS ARE TO BE CONSTRUED LIBERALLY, so as to sustain and not destroy the rights of inventors: Curt. Law Pat., sec. 225; *Francis v. Mellor*, 5 Fish. Pat. Cas. 153; *Goodyear v. Railroad*, 2 Wall. jun. 356; *Ames v. Howard*, 1 Sumn. 482. So that if a patentee honestly sets forth the process and mode

of compounding a new and valuable composition of matter, the courts will give his specification a liberal construction: *Goodyear v. Railroad*, 2 Wall. jun. 356. Grier, J., in the case last cited, says: "In anomalous cases like the present, when a new product has been discovered, and the process of compounding it or obtaining it is disclosed, the patentee, by stating his discovery and revealing his process, has done all that he is required to do or can do. The careful separation of new from old, the limitation of claims to particular parts or combinations, can not be required as a substantial part of the specification. If a specification sets forth a discovery, a new composition of matter, and the process for compounding it, that should be taken as the extent of his claim and the measure of his franchise." The language of a specification is addressed to those who are supposed to be familiar with the invention covered by the patent, and if the patentee has described his invention in such full, clear, and exact terms that one skilled in the branch to which it pertains can construct it, if a machine, or carry it successfully into effect, if a process, his patent will be sustained: *Whitney v. Mowry*, 3 Fish. Pat. Cas. 57; *Tilghman v. Mitchell*, 4 Id. 599; *Woodward v. Morrison*, 5 Id. 357. And a patent will not be considered invalid because the specification does not describe such parts as practical use would at once suggest as necessary to render the machine efficient: *Union Paper Bag Co. v. Nixon*, 6 Id. 402. If from the specifications and drawings, taken as a whole, any person skilled in the art could construct the machine therein described, without invention of his own, the patent is good, although there may be a mistake in describing the action of some part of the machinery, which could be easily discovered by the mechanic in making the machine: *Singer v. Walmsley*, 1 Id. 558.

AMBIGUITY IN SPECIFICATION, EFFECT OF.—Ambiguity, uncertainty, or obscurity in the description of an invention will render a patent therefor void: *Davoll v. Brown*, 1 Woodb. & M. 57; *Hovey v. Stevens*, 3 Id. 17; Curt. Law Pat., sec. 234. If the terms of a specification are so obscure or doubtful that the court can not say what is the particular improvement which the patentee claims, and to what it is limited, the patent is void for ambiguity: *Barrett v. Hall*, 1 Mason, 447, 476; *Evans v. Hettick*, 3 Wash. C. C. 425; *Whitney v. Emmett*, 1 Bald. 320; *Downton v. Yaeger Milling Co.*, 9 Rep. (N. S.) 462; *Carlton v. Bokee*, 6 Fish. Pat. Cas. 40; *Wood v. Underhill*, 5 How. (U. S.) 1, 5. Courts are, however, unwilling to declare a patent void on the ground of vagueness or ambiguity, unless it be very clear and unmistakable: *Swift v. Whisen*, 3 Fish. Pat. Cas. 343. And accordingly a description, though in some respects obscure, imperfect, or not so intelligible as to fully answer all the objects of the law, will be held good, if it enables the court to specify the improvements or invention patented, from the face of the patent and accompanying papers. And it will be considered enough if there is a substantial description of the thing patented: though defective in form or mode of explanation: *Whitney v. Emmett*, 1 Bald. 303; *Ames v. Howard*, 1 Sumn. 482. Absolute precision is not required in a specification. It is sufficient if a mechanic skilled in the art to which the invention pertains, not simply an ordinary mechanic, can, from the specification and drawings, construct and use the invention described: *Dorsey Harvester and Revolving Rake Co. v. Marsh*, 6 Fish. Pat. Cas. 387. And before a court will declare a patent void for ambiguity, it will carefully construe the whole of the specification taken together, and endeavor, by a liberal interpretation of all its parts, to avoid the necessity of so declaring: *Ames v. Howard*, 1 Sumn. 485; *Burrall v. Jewett*, 2 Paige, 134; *Swift v. Whisen*, 3 Fish. Pat. Cas. 343; *Howes v. Nute*, 4 Id. 263; *Park v. Little*, 3 Wash. C. C. 196; *Teese v. Phelps*, 1 McAll. 48; *Gray v. James*, Pet. C. C. 394; *Brooks v. Bicknell*, 3 McLean, 250.

PROPRIETORS OF ENFIELD v. PERMIT.

[8 NEW HAMPSHIRE, 512.]

TENANT, IN WRIT OF ENTRY, can not disprove demandant's actual seisin of the demanded premises, by showing title in a third person under whom he does not claim.

GRANT OF LAND BY AN ACT OF THE LEGISLATURE vests an actual seisin in the grantee.

WRIT of entry to recover a tract of land in Enfield, tried upon the general issue. This case was before the court on a former occasion, and is reported in 20 Am. Dec. 580. In the charter of Enfield, granted in 1761, the southerly line of the township is described as running S. 68° E. In the charter of Grantham, granted in 1767, the northerly line of the township is described as beginning at the south-west corner of Enfield, and running S. 58° E., bounding on Enfield. It was clearly shown that "S. 68° E." had been inserted in the charter of Enfield by mistake, instead of "S. 58° E." This mistake was corrected by an act of the legislature passed in 1802. The demandants introduced evidence tending to prove that they had long since entered upon and claimed the gore of land between the line running S. 58° E. and the line running S. 68° E. The tenant, in order to disprove demandant's seisin, offered to show that, previous to the grant of the charter to Grantham, the south line of Enfield had been actually located as running south 68° east, so that the demanded premises must be considered as lying within the township of Grantham; but he set up no title or claim to the land under the proprietors of Grantham. The court being of opinion that the evidence was inadmissible for the purpose of disproving the demandant's seisin, a verdict for the demandants was taken by consent, subject to the opinion of the court upon the foregoing case.

Perley, for the demandants.

Bell, for the tenant.

By Court, **RICHARDSON, C. J.** It must now be considered as settled law in this state, that where a demandant in a writ of entry shows an actual seisin in himself of the demanded premises, such seisin can not be disproved on the part of the tenant by showing a title in a third person, under whom he does not claim: *Bailey v. March*, 3 N. H. 274; *King v. Barns*, 13 Pick. 24. But it is insisted, on the part of the tenant, that the evidence introduced by the demandants was insufficient to prove that they ever had an actual seisin of the gore of land in which the demanded premises lie. To this it was answered, that the

act of the legislature, passed the eighteenth of June, 1802, independent of the other testimony, gave the demandants an actual seisin.

We shall proceed to examine the legal effect of that act. The proceedings in the legislature in relation to the said gore, clearly show that the understanding of the legislature and of the proprietors of Enfield and Grantham was, that the gore, through a mistake in the charter of Enfield, had been left ungranted; and the object of the act was to vest the gore in the proprietors of Enfield, and locate the township of Enfield according to the intent of the charter. The act amounts to a grant of the gore to the proprietors of Enfield: 5 N. H. 280; *Stokes v. Dawes*, 4 Mason, 268.

It has always been held, in this state, that the deed of one who is actually seised, passes an actual seisin. Thus in *Bailey v. March*, 3 N. H. 274, it was held, that to give a demandant an actual seisin, which could not be disproved by showing a title in a stranger, it was enough to show that he had a deed from one who had an actual seisin. A grant of land by an act of the legislature vests an actual seisin in the grantee. The grant in such a case is a public act, much better calculated to give notoriety to the conveyance than an actual entry upon the land by an agent of the state, or by the grantee. And this notoriety of the grant is, in contemplation of law, equivalent to an actual entry by the grantee: 8 Cranch, 246-248; 5 Coke, 94; *Hill v. Dyer*, 3 Green, 441.

When this case was before us on a former occasion, we were of opinion that the actual location of Enfield by the legislature was valid against all the world except the proprietors of Grantham. And we are now of opinion that the act of the legislature vested in the proprietors of Enfield an actual seisin of the gore, which in twenty years ripened into a complete title, even against the proprietors of Grantham, whatever their claims might have otherwise been, if during the twenty years they acquiesced in the act of the legislature without setting up any claim to the gore. The evidence offered, then, by the tenant, to prove a title in the proprietors of Grantham, was properly rejected, and there must be

Judgment on the verdict.

PARKER, J., did not sit.

Cited in *Donner v. Palmer*, 31 Cal. 514, to the point, that a grant, though unsigned, may be sufficient evidence of title.

MARKHAM v. BROWN.

[8 NEW HAMPSHIRE, 523.]

INNKEEPER IS BOUND TO ADMIT, UNDER PROPER LIMITATIONS, TRAVELERS and those also who have business with them as such, and if he gives a general license to enter his inn to some persons whose business is connected with his guests, in their character as travelers, he can not lawfully exclude others, pursuing the same business, and who enter for a similar object.

STAGE-DRIVER MAY ENTER AN INN and go into the public rooms where travelers are usually placed, to solicit passengers for his coach, if he has a reasonable expectation that passengers are there, comes at a suitable time and in a proper manner, conducts himself peaceably, remains no longer than is necessary, and does no injury to the innkeeper; and this he may do notwithstanding the prohibition of the innkeeper, if the latter allows like privileges to the drivers of other coaches.

SUCH DRIVER MAY, HOWEVER, FORFEIT THESE RIGHTS by his misconduct, as by causing affrays or quarrels, making a noise, disturbing guests in the house, interfering with its due regulation, intruding into private rooms, remaining longer than is necessary after being requested to depart, or by improper importunity to the guests to induce them to take passage with him; and if he is guilty of any of these acts of misconduct or impropriety, the innkeeper may prohibit him from entering his inn, and treat him as a trespasser if he disregards such prohibition.

ONE WHO ENTERS AN INN LAWFULLY may be treated as a trespasser *ab initio*, if, after entry, he commits an assault upon the owner or a trespass upon his property.

INNKEEPER CAN NOT EXPEL FROM HIS INN DRIVER OF RIVAL LINE OF COACHES for the misconduct of drivers of other lines towards him, unless it is at the time of a disturbance and for the purpose of restoring quiet to the house.

TRESPASS, for breaking and entering the plaintiff's house, a common inn, and making a noise and disturbance therein, and assaulting and beating the plaintiff. Plea, the general issue, with a brief statement that the defendant was the driver of a stage-coach, and entered the plaintiff's house to inquire for passengers, and that the force, if any, was the plaintiff's own assault. On the trial it appeared that the defendant was the driver and proprietor of an opposition line of coaches, which brought passengers to, and took them away, from the plaintiff's inn. Frequent altercations took place between the defendant and the drivers of the other lines of coaches; and the plaintiff, who seemed to be in the interest of the other drivers, forbade the defendant to come to his house. After this the defendant went into a parlor in the plaintiff's house, where there were some recently-arrived guests; and an altercation there ensued between the defendant and one Philbrick, another driver, who

had gone there to solicit passengers; and the altercation ended in an affray and assault and battery. The evidence was contradictory as to who commenced the affray. The plaintiff thereupon ordered Brown to leave the house. There was evidence that the defendant refused to leave, insisting that he had a right to be there; and that while the plaintiff stooped to pick up a stick of wood, defendant seized and held him. Other witnesses stated that the plaintiff went in with a club, and all the defendant did was to ward off the blow; that he told the plaintiff that he would go out if he laid down the club, and that he did go as soon as the plaintiff desisted. The jury found a verdict for the defendant; and the plaintiff moved for a new trial.

Perley, for the plaintiff.

Blaisdell and Bell, for the defendant.

PARKER, J. An innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travelers, he can not prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.

But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. He is not obliged to receive one who is not able to pay for his entertainment: *Thompson v. Lacy*, 3 Barn. & Ald. 283. And there are considerations of greater importance than this. He is indictable if he usually harbor thieves: 1 Hawk., c. 78, sec. 1; Bac. Abr., Inns, etc.; and he is answerable for the safe keeping of the goods of his guests: Story on Bail. 307; and is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods of his guests, or his own. So he is liable if his house is disorderly: 1 Hawk. 451; and can not be held to wait until an affray is begun before he interpose, but may exclude common brawlers, and any one who comes with intent to commit an assault, or make an affray. So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance.

He has a right to prohibit common drunkards and idle persons from entering, and to require them, and others before mentioned, to depart, if they have already entered. And any per-

son entering, not for a lawful purpose, but to do an unlawful act—as to commit an assault upon one lawfully there—must be deemed a trespasser in entering for such unlawful purpose.

As he is bound to admit travelers, under certain limitations, he may likewise be held, under proper limitations, to admit those who have business with them as such. This may be considered as derived from the right of the traveler. It is conceded that he may be bound to permit the entry of persons who have been sent for by the guest. But we think the rule is not to be limited, in all cases, to this. There may be such connection between travelers and those engaged in their conveyance, that the latter, although not specially sent for, may have a right to enter a common inn; or such that the landlord, if he give a general license to some of those whose business is connected with his guests, in their characters as travelers, can not lawfully exclude others, pursuing the same business, and who enter for a similar object.

There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests—the same lawful purpose—comes in a like suitable condition, and with as proper a demeanor; any more than he has the right to admit one traveler and exclude another, merely because it is his pleasure. If one comes to injure his house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here. And perhaps there may be cases in which he may have a right to exclude all but travelers and those who have been sent for by them. It is not necessary to settle that at this time.

In the present case it appeared that stage-coaches brought their passengers to the plaintiff's inn from various quarters, and carried them away in different directions. It is understood that Hanover was not a place where the lines of stages or conveyances terminated, and where passengers were left to seek their own conveyance onward, as is often the case in the larger cities; but that the line of stages extended through the place in such manner that travelers might reasonably expect conveyances onward would be tendered for their use. The drivers of some of the coaches were accustomed to resort to the plaintiff's inn, and boarded there.

Under these circumstances, we see no objection to the first part of the charge to the jury. The defendant had clearly a

right to establish a line of stage-coaches, and to go to the plaintiff's inn with travelers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare.

And we are of opinion that, so long as others were permitted to do the same, the defendant had an equal and lawful right, notwithstanding any prohibition by the plaintiff, to enter the plaintiff's inn for the purpose of tendering his coach for the use of travelers, and soliciting them to take passage with him; and for that purpose to go into the common public rooms of the inn, where guests were usually placed to await the departure of the stages, although he was not requested by such guests; provided there was a reasonable expectation that passengers might be there, and he came at a suitable time, in a proper manner, demeaned himself peaceably, and remained no longer than was necessary, and was doing no injury to the plaintiff.

But the jury should have been instructed that the defendant might forfeit this right by his misconduct, so that the plaintiff might require him to depart, and expel him; and if, by reason of several instances of misconduct, it appeared to be necessary for the protection of his guests or of himself, the plaintiff might prohibit the defendant from entering again, until the ground of apprehension was removed. Thus, if affrays or quarrels were caused through his fault, or he was noisy, disturbing the guests in the house, interfered with its due regulation, intruded into the private rooms, remained longer than was necessary, after being requested to depart, or otherwise abused his right, as by improper importunity to guests to induce them to take passage with him; the plaintiff would have a right to reform that, and, if necessary, to forbid the defendant to enter, and treat him as a trespasser if he disregarded the prohibition. So, if, after a lawful entry of the defendant, he committed an assault upon the plaintiff, or any trespass upon his property, the plaintiff might treat him as having entered for the unlawful purpose, and as a trespasser *ab initio*: 8 Co., Dub. ed., 291;¹ 10 Johns. 373;² 12 Id. 408;³ 11 East, 402;⁴ 5 Taunt. 198.⁵

Perhaps a trespass upon the person or property of a guest might come within the same rule; but this is not clear, and need not now be settled.

If others were guilty of an assault upon the defendant, or of

1. *Six Carpenters' case*

2. *Hopkins v. Hopkins.*

3. *Adams v. Freeman*; 8. C., 7 Am. Dec. 327.

4. *Winterbourne v. Morgan.*

5. *Attenhead v. Bladen.*

misconduct towards him, that would not justify him in making an assault, except in self-defense, nor furnish an excuse for improper conduct on his part; but if he behaved himself with propriety, the misconduct of the drivers of other lines towards him would furnish no ground for his exclusion, unless it was at the time of a disturbance, and for the purpose of restoring quiet to the house.

As the jury were not correctly instructed upon these points, there must be a new trial.

Cited in *Commonwealth v. Power*, 7 Metc. (Mass.) 601, to the point that an innkeeper has the right and it is his duty to exclude all disorderly persons, and all persons not conforming to regulations necessary and proper to secure quiet and good order in his house; and in *McKee v. Owen*, 15 Mich. 132, to the point that an innkeeper may exclude improper characters.

TRESPASS QUARE DOMUM FREGIT CAN NOT BE MAINTAINED, without showing an unlawful entry into the house: *Harris v. Gillingham*, 23 Am. Dec. 701.

TRESPASSER AB INITIO, WHO IS.—One who enters a dwelling-house by permission of the occupant, and remains after a request to leave, is liable as a trespasser *ab initio*: *Adams v. Freeman*, 7 Id. 327.

BURLEIGH v. BENNETT.

[9 NEW HAMPSHIRE, 15.]

ACTION FOR MONEY HAD AND RECEIVED may be maintained by former guardian against his ward, where the former sold the land of the latter, but the sale was subsequently set aside as void, in an action by the ward, although the guardian had accounted for the proceeds of such sale and had his account settled by a decree of the probate court.

ASSUMPSIT for money had and received, and for money paid, laid out, and expended. The facts sufficiently appear from the opinion.

Stickney and Christie, for the plaintiffs.

Sullivan, for the defendant.

UPHAM, J. In this case it is contended that the plaintiffs are not entitled to recover back any portion of the amount charged against them in account with their ward, for the reason that judgment has been entered up against them for said sums, by decree of the probate court.

There is no doubt, where money has been recovered by the judgment of a court having competent jurisdiction and the judgment has been satisfied, that the debtor can not afterwards

recover back the amount paid in another action, while such judgment remains in force. The case of *Loring v. Mansfield*, 17 Mass. 394, is to this effect, and numerous authorities are there cited; and were it the necessary result that these authorities would be overruled, or that the principle sustained by them would be subverted by sustaining the present action, we should have no hesitation in holding that this suit could not be maintained.

But the ground of recovery in this case, on the part of the plaintiffs, arises from matter entirely subsequent to the decree against them. That decree was rendered in favor of the ward as a compensation for property, the consideration of which had come into the plaintiff's hands by virtue of a supposed legal sale of the ward's estate by the plaintiffs, as his guardians. While the plaintiffs held the proceeds of such property, they were bound to account for it, and were required so to do by decree of the probate court. But subsequently, by the act of the ward, or of his new guardian, the sale was avoided, and the plaintiffs were compelled to refund the money to the purchaser of the land. The decree of the judge of probate was based on an account rendered on a supposed legal sale of the ward's property; and it is as much interfering with that decree, for the ward to deny the sale of the property, or attempt to rescind or avoid it, as it is, when such sale has been avoided, for the plaintiffs to reclaim the money allowed on account of said sale.

Neither of them affects the judgment of the court. It is the act of the defendant subsequent to the decree that gives the plaintiffs their cause of action. The defendant, by claiming and appropriating to his own use the property for which the plaintiffs had paid him the sum now sued for, divests himself of the right to retain the money. He can not retain both; and he has in his hands, according to all received principles of law, money had and received to the plaintiffs' use. It is the ordinary case of an attempt to recover back money paid on a consideration which has failed.

In *Williams v. Reed and Trustee*, 5 Mass. 480,¹ a guardian sold lands of his ward under a license of court, without taking the oath and giving bonds as required by law. It was holden that the purchaser, after having paid a part of the consideration, might refuse to take a deed and recover back the money. In this case, if the new guardian refuses to ratify the sale, or re-

1. 5 Pick. 480.

vokes it on account of like defects, the plaintiffs may, on the same ground, recover their money.

In the case, *Shearman et al. v. Akins*, 4 Pick. 283, which is almost precisely like this case, an action for money had and received was sustained, and the decree of the judge of probate was considered as no bar to sustaining the action.

Judgment for plaintiff.

WINKLEY v. HILL.

[9 NEW HAMPSHIRE, 31.]

CONVEYANCE ABSOLUTE IN TERMS, BUT ATTENDED WITH SECRET TRUST, that the grantor shall have the land again, on repayment of the money he received, is void as against the creditors of the grantor.

WRIT of entry to recover a tract of land in Strafford, tried upon the general issue, and a verdict taken by consent for the demandant, subject to the opinion of the court on the following case: For many years prior to 1834, A. N. Hill had been in possession of the demanded premises. In December, 1833, the demandant recovered judgment against said Hill, and in April, 1834, caused an execution issued on said judgment to be duly extended upon the premises. In January, 1834, A. N. Hill executed to W. Hill, the tenant, the conveyance mentioned in the opinion.

Hale, for the demandant.

Bartlett and Burleigh, for the tenant.

By Court, RICHARDSON, C. J. The conveyance by A. N. Hill to the tenant was absolute on the face of the deed; but the understanding of the parties to it was, that it should be a mere security for the repayment of the consideration named in the instrument, a mortgage in its real nature, provided A. N. Hill should choose so to consider it. It was, then, a conveyance absolute in its terms, but attended with a secret trust that the grantor should have the land again, on repayment of the money he had received. The question is, whether such a conveyance is valid against the creditors of the grantor?

This question has been considered as settled in this state for some time, as appears by the cases cited by the demandant's counsel. As such trusts are in their nature calculated to delay, hinder, and defraud creditors, the law, without stopping to learn the real motives and intentions of the parties, denounces all such trusts as frauds that render void the contracts under which they rise. Nor are the grounds and reasons on which such trusts are thus denounced, at all unsatisfactory. It must

be extremely rare that they can be necessary to answer any honest purpose. What fair and proper motive can any man, who is in debt, have to adopt a mode of conveyance in transferring his property that carries falsehood on the face of it, while the truth lies hid and concealed beneath? Truth and honesty are usually companions; and fair dealing holds no fellowship with falsehood. Honest debtors, who are willing to act fairly with their creditors, never resort to false and feigned conveyances. Men who honestly pay their debts have no occasion to create secret trusts. It was a remark of Lord Coke, that frauds are like birds secretly hatched in hollow trees. False and pretended conveyances of property are the hollow trees in which secret trusts are hatched. They are never found in real sales. To actual sellers they will rarely be of any use or benefit; and actual purchasers will be as rarely found willing to take what they buy, subject to such trusts. And it is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have any occasion to resort in sales of their property; and because they are the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case.

The secret understanding between the parties to the deed under which the tenant claims, that the grantor should have the land again on repayment of the purchase money, strongly indicates that the sale was not a real, but a false and pretended sale. And if the only object of the conveyancer had been to secure the payment of money advanced, the conveyance would have been in mortgage. The mode of conveyance adopted is, under the circumstances, calculated to cover the whole transaction with suspicion. The facts disclosed render it somewhat probable that the conveyance was merely intended by the parties to it to place the land beyond the reach of the demandant's execution. But however this may be, the court is of opinion, that the secret trust which attended the conveyance must be pronounced as a fraud in law, which renders void the conveyance, and there must, of course, be

Judgment on the verdict.

CONVEYANCES FRAUDULENT AS TO CREDITORS: See *Waller v. Todd*, 28 Am. Dec. 94, note 113; *Stewart v. Iglehart*, Id. 202, note 206; *Chapin v. Pease*, 25 Id. 56, note 59; *Carlton v. King*, 23 Id. 295; *Johnston v. Harvey*, 21 Id. 426; *Hudnall v. Wilder*, 17 Id. 744, note 755, where the other cases in this series are collected.

STATE v. BURNHAM.

[9 NEW HAMPSHIRE, 34.]

LIBEL IS AN OFFENSE PUNISHABLE in this state by indictment.

PUBLICATION OF MATTER IN ITS NATURE DEFAMATORY, unless made upon a lawful occasion, or unless it comes within the class termed privileged cases, renders the person responsible for such publication liable to prosecution; and it is immaterial, in such case, whether the allegations are true or false.

PARTY MAY JUSTIFY OR EXCUSE PUBLICATION OF LIBELOUS MATTER when the occasion is lawful, as where his object was to secure the removal of an incompetent officer, to prevent the election of an unsuitable person to office, or to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information.

MERE COLOR OF LAWFUL OCCASION and pretense of justifiable end, can not shield from liability a party who publishes and circulates defamatory matter.

DEFENDANT MAY JUSTIFY PUBLICATION BY PROVING THE TRUTH of the matter alleged, if the occasion was a proper one for circulating the matter set forth; but in such case the justification must be as broad as the charge, and it is not sufficient to show that part of the matter is true.

MOTIVES OF DEFENDANT ARE NOT IN QUESTION where he justifies by showing that there was a lawful occasion for the publication, and that the matter published is true.

DEFENDANT MAY, IF HE CAN NOT JUSTIFY, EXCUSE PUBLICATION by showing that it was made on a lawful occasion, upon probable cause, and from good motives; but probable cause alone will not, upon any occasion, excuse the publication of falsehood, from actual malice.

INDICTMENT for publishing a false, malicious, and defamatory libel upon Lyman B. Walker, at the time solicitor for the county of Strafford. The publication was in the form of an address or petition to the two branches of the legislature, alleging that Walker was intemperate, incompetent to discharge the duties of his office, and that his character was notoriously immoral, and praying for his removal from office. On the trial the evidence showed that the defendant had about two hundred copies of the alleged libel printed, and had many of them distributed among residents of the county of Strafford; it never was presented to the legislature, and there was some evidence to show that the defendant did not intend to pursue the petition, but circulated it merely out of hostility to Walker. The defendant endeavored to show that he fairly intended the publication as a petition for Walker's removal; that it was circulated for the purpose of obtaining signatures; and that the allegations were true. He contended that this was a privileged communication, made upon probable cause, and not a libel, even if not true.

The jury returned a verdict of guilty, and the defendant moved for a new trial on the ground of misdirection, and contended that an indictment for libel could not be sustained in this state.

Bartlett and Christie, for the defendant.

Gove, attorney-general, for the state.

PARKER, J. It is not disputed that by the common law the publication of a libel is an offense punishable by fine and imprisonment; and we are of opinion that an indictment at common law, for a libel, may well be sustained in this state. The reasons for the opinion that the common law, generally, so far as it is applicable to our institutions and form of government, has been adopted here, as a part of the law of this state, are given at length in *The State v. Rollins*, 8 N. H. 550, in which the question was first argued, and need not now be repeated.

It certainly can not be held, that there is anything in the nature of our institutions, or the character of our government, which should preclude a libel from being deemed an offense, or render a proceeding by indictment an improper mode for enforcing the punishment of it. The reason given by the English jurists, that libels have a tendency to promote breaches of the peace, is as true here as in that country. The spirit of our institutions equally requires the preservation of good order; and reputation is as dear, and should be quite as great an object of legal protection.

If it be true that some of the doctrines, originating in the star chamber, relative to the mode of trial, have been founded in error, or influenced by reasons of state policy, and are not such as can be applied here, being at variance with the spirit of our institutions, and the sound principles which govern analogous cases, if not in truth corruptions of the common law (3 Johns. Cas. 380), this will furnish no reason to justify us in withdrawing libel from its place in the catalogue of offenses at common law, or in abrogating the proceeding by indictment for its punishment.

The common law on the subject of libels has been held to be in force in Massachusetts, Connecticut, New York, and South Carolina: *Commonwealth v. Clap*, 4 Mass. 163 [3 Am. Dec. 212]; *Commonwealth v. Blanding*, 3 Pick. 304 [15 Am. Dec. 214]; *State v. Avery*, 7 Conn. 266 [18 Am. Dec. 105]; *People v. Crosswell*, 3 Johns. Cas. 337; 2 Kent Com. 16; *Commonwealth v. Whitmarsh*, 16 Am. Jur. 92. And it is understood, that in *The State v. Turell*, S. J. court, Rockingham, November term, 1814,

which was an indictment for libel, there was no intimation that a libel was not a crime, punishable here by indictment; although the indictment was held bad, on demurrer, for the want of an innuendo applying the slander. If it be deemed advisable that it should be expunged from the criminal code, and held to be merely the subject of a civil proceeding for damages, the legislature can readily make the necessary provision.

Nor can the argument that the provincial statute of 1701, for the punishment of criminal offenders, superseded the common law upon this subject, avail the defendant. That act, which provided that if any person of the age of fourteen years or upwards, should wittingly or willingly make or publish any lie or libel, tending to the defamation or damage of any particular person, or make or spread any false news or reports, with intent to abuse and deceive others, such person should, on conviction before one or more justices of the peace, be fined according to the degree of the offense, not exceeding twenty shillings for the first offense, and find sureties for his good behavior, etc., was intended for the punishment of minor offenses, and probably verbal slander, by giving a jurisdiction to justices of the peace.

The same act authorized any justice to "punish the breach of the peace, in any person that shall smite or strike another, by fine to the king, not exceeding twenty shillings, or require bond for their good behavior, and to pay all just costs;" but this could hardly have been intended to oust the jurisdiction of the common law courts, and be the only punishment in all cases of assault and battery: N. H. Prov. L. 17.

Similar remarks will apply to the provisions in the statute of 1791-2, relating to lie or libel, and which remained in force until 1829: N. H. L., ed. 1815, 329; Id., ed. 1830, 146. By that statute the court, or justice, was authorized to fine the delinquent, not exceeding forty shillings, etc. The same statute enacted, that any person guilty of assault and battery, should be fined not exceeding forty shillings; but this has uniformly been held not to supersede the common law for the punishment of that offense. All statutory provisions for the punishment of libel have been repealed, and this indictment is at common law.

We come next to the direction to the jury, that the matter, if in its nature defamatory, must have been published upon a lawful occasion, or come within the class termed privileged cases; and that if it did not, the defendant was liable to this prosecu-

tion, it being immaterial whether the allegations were true or false.

The authorities fully support this position: *Commonwealth v. Clap*, 4 Mass. 163 [3 Am. Dec. 212]; *Commonwealth v. Blanding*, 3 Pick. 312 [15 Am. Dec. 214]; *Clark v. Binney*, 2 Id. 117; *Cockayne v. Hodgkisson*, 5 Car. & P. 543; *The King v. Creevey*, 1 Mau. & Sel. 280. And it rests upon sound and satisfactory principles. One great object of the law is to preserve the peace of the community. The publication of matter which is true, may have quite as great a tendency to excite to breaches of the peace, as if false; and although this can furnish no justification for the doctrine, that the greater the truth the greater the libel, it will serve to show that no one can justify or excuse the publication of matter tending to bring another into contempt or disgrace, without any lawful occasion for making such a publication. If crimes exist, let them be punished in the due course of law; but it is not expedient that the errors, or foibles, or even the crimes of individuals, should be made the subject of written publication, except for the purpose of answering some good end. Public proclamations for the mere purpose of gratifying a spirit of detraction, or circulating defamatory matter among the community, are neither necessary nor useful; and in most instances, where some grounds may exist in support of the allegations, they are greatly exaggerated. There can, therefore, be no good reason why the law should extend its protection to publications of such a character.

If the end to be attained is justifiable; as, if the object is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or, generally, to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful, and the party may then justify or excuse the publication.

Where, however, there is merely color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretense had not been resorted to: *King v. Root*, 4 Wend. 114; *Bradley v. Heath*, 12 Pick. 165 [22 Am. Dec. 418]; *Hunt v. Algar*, 6 Car. & P. 245; *Wilson v. Collins*, 5 Id. 373; *Hill v. Miles*, 9 N. H. 9. The reason is too obvious to need elucidation. There must be a lawful occasion to excuse the speaking of defamatory words:

Sewall v. Collin, 3 Wend. 294; *Hurlingame v. Burlingame*, 8 Cow. 141.

If it be found that the occasion was of itself a proper one in which matter of the nature set forth might be circulated, the defendant may justify the publication, by proving the truth of the matter alleged. Authorities can hardly be necessary in support of this position. Such cases have been termed privileged cases. We think the same rule applicable, in this respect, in criminal, as in civil cases: 2 Kent Com. 20.

But in such case the justification must be as broad as the charge. It can not be a sufficient justification, to show that part of the matter is true: *Skinner ads. Powers*, 1 Wend. 451; 7 Cow. 634;¹ *Stow v. Convers*, 4 Conn. 17; *Roberts v. Brown*, 10 Bing. 519; *Riggs v. Denniston*, 3 Johns. Cas. 198 [2 Am. Dec. 145]; *Spencer v. Southwick*, 11 Johns. 594; *Sterling v. Sherwood*, 20 Id. 204.

If in such case the defendant justifies by showing the truth, his motives are not in question. If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice: *The King v. Wright*, 8 T. R. 297; *Root v. King*, 7 Cow. 613; *Fairman v. Ives*, 5 Barn. & Ald. 642; *King v. Root*, 4 Wend. 113 [21 Am. Dec. 162]; *Gilman v. Lowell*, 8 Id. 578 [24 Am. Dec. 96]. Encouragement is often held out, by law, to common informers, to prosecute, and such persons are in many instances actuated by malice or cupidity; but the motive is immaterial, so long as the prosecution is well grounded.

It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable, and that, in such case, must be sufficient. If the defendant can not justify, he may show matter of excuse. It is said in several of the authorities, that the defendant may justify, or excuse the publication. Upon principle, however, there is a palpable distinction between the two.

In a civil case, matter in justification should be pleaded, or notice of it given by a brief statement: *Laine v. Wells*, 7 Wend. 175; *Powell v. Harper*, 5 Car. & P. 590; *Cockayne v. Hodgkinson*, Id. 543. But matter in excuse, merely, it is apprehended, is properly given in evidence under the general issue, although it is said it may be pleaded: *Bradley v. Heath*, 12 Pick.

1. *Root v. King*.

163 [22 Am. Dec. 418]; *Remington v. Congdon et al.*, 2 Id. 310 [13 Am. Dec. 431]; *Bodwell v. Swan*, 3 Id. 377; *Jackson v. Stetson*, 15 Mass. 50; *Warr v. Jolly*, 6 Car. & P. 497; *Lewis v. Walter*, 4 Barn. & Ald. 605; 1 Saund. 130,¹ note.

Matter in excuse, in a prosecution for a libel, is where the defendant, upon a lawful occasion, proceeded with good motives—upon probable grounds—upon reasons which were apparently good, but upon a supposition which turns out to be unfounded. This is very different from showing the actual truth of the allegations; and here the charge to the jury makes the motives of the defendant material. The direction is, substantially, that probable cause is not a sufficient defense, if the defendant was actuated by bad motives. The matter principally controverted in this case, arises out of this part of the charge.

It is argued, that showing probable cause ought of itself to furnish a sufficient defense, without any inquiry into the motives of the defendant. But this argument would place probable cause and the truth upon the same ground, which we think is incorrect. Probable cause is undoubtedly a circumstance, and a strong one, to rebut any presumption of malice; as the absence of it is evidence to show malice. But malice may exist, notwithstanding there is probable cause; and if it is proved to have existed, why should probable cause alone be a complete defense for a publication not warranted by the truth, and made from actual malice, or ill will, with a design to injure?

It is urged, that this is like an action for a malicious prosecution, in which the defendant may show that he had probable cause, and that this furnishes a sufficient defense, even if he was actuated by express malice. But there is a plain distinction, and one of some importance. The policy which permits a party to assert what, upon probable grounds, he believes to be his own rights, and perhaps, also, what he believes to be the rights of the government, in the due course of justice, does not extend to other occasions, where a similar necessity does not exist. Even there, the form of a judicial proceeding must not be adopted to subserve improper purposes: *Hill v. Miles*, 9 N. H. 9. In other cases, it is sufficient for the party to act upon probable grounds merely, where he has a good motive of some kind to influence him. There should be no impunity in such case for express malice, and an actual attempt, induced by such malice, to do an injury to another. In cases which do not come within the courts of justice, no form is required, and there is no ne-

1. *Lake v. King*.

cessity for making any allegation which has actual malice and ill will for its foundation, broader than the truth will warrant.

It seems to be going quite far enough for any useful purpose, to hold that an individual may, without actual necessity, publish what is false of another, if he had probable cause for so doing, and was actuated by good motives. The authorities, it is believed, will carry us no farther: *Vanderzee v. McGregor*, 12 Wend. 545 [27 Am. Dec. 156]; *Bodwell v. Osgood*, 3 Pick. 379; [15 Am. Dec. 228]; 2 Id. 310;¹ 4 Mass. 169;² 6 Car. & P. 497;³ 5 Id. 543;⁴ *Sewell v. Catlin*,⁵ 3 Wend. 291; 8 Id. 579; *Inman v. Foster*, 8 Id. 606; *Thorn v. Blanchard*, 5 Johns. 525, 526, opinion of the chancellor; *Lewis v. Few*, Id. 35; 3 Johns. Cas. 393;⁶ 12 Pick. 163;⁷ *Hodgden v. Scarlett*,⁸ 1 Barn. & Ald. 232; 4 Id. 605;⁹ 5 Id. 642;¹⁰ *Bromage v. Prosser*, 4 Barn. & Cress. 247; *Woodward v. Landon*, 6 Car. & P. 548; *Delany v. Jones*, 1 Esp. 191;¹¹ *McDougall v. Claridge*, 1 Camp. 267; *Brown v. Croome*, 2 Stark. 297; *Kelley v. Partington*, 4 Barn. & Adol. 700. If the party can not excuse the utterance of words, where there is express malice, he can not surely excuse the publication of a writing. In *Lake v. King*, 1 Saund. 131; 1 Lev. 240, it did not appear that the defendant was actuated by malice.

The statutes passed on this subject by several states do not go so far as the rule here stated, as they only authorize the defendant to show that he published the truth with good motives, and for justifiable ends.

It would be departing from all sound principle to hold, as a general rule, that one might publish falsehood from bad motives. The matter being untrue, and the motive bad, how could the end be said to be justifiable? Proposing, from malice, to cause an injury to another by what is in fact false, can hardly be justified or excused by any code of ethics, even if there was reason to believe its truth. And neither the interests of public justice nor the authorities, require us to hold such doctrine.

It would be an idle and vain attempt to endeavor to reconcile all the discussions in the books upon the subject of libel and slander. Many of the cases which have been cited to some of the points in this opinion, contain other principles, not in accordance with it, and which of course we can not be understood as adopting. But the distinctions, now attempted to be sus-

1. *Remington v. Congdon*; S. C., 13 Am. Dec. 431.

2. *Commonwealth v. Clap*; S. C., 3 Am. Dec. 212.

4. *Cockayne v. Hodgkinson*.

5. *Sewall v. Catlin*.

7. *Bradley v. Heath*; S. C., 22 Am. Dec. 418.

9. *Lewis v. Walter*.

10. *Fairman v. Ives*.

3. *Warr v. Jolly*.

6. *People v. Crosswell*.

8. *Hodgson v. Scarlett*.

11. 4 Esp. 191.

tained, will, perhaps, in some degree reconcile the decisions themselves; and they seem to furnish sound practical rules, which, while they give no countenance to defamation, protect all persons in publishing, upon lawful occasions, the truth from whatever motives, and what they have reason to believe the truth, if it is done with motives which will bear examination. And we do not think that the interests of the community, or the principles of our institutions, require that the truth should be either justification or excuse, where the allegation has been made without any necessity or any fair occasion for it—made in the spirit of detraction, and not to subserve any justifiable purpose; or that any one should be permitted, upon any occasion, to publish falsehood from actual malice.

The objections of the defendant must, therefore, be overruled.

LIBEL—PRIVILEGED COMMUNICATIONS: See *Vanderzee v. McGregor*, 27 Am. Dec. 156, note 158; *King v. Root*, 21 Id. 102; *Bodwell v. Osgood*, 15 Id. 228, note 232; *Thomas v. Croswell*, 5 Id. 269, note 273; *Respublica v. Dennis*, 2 Id. 402.

TRUTH AS JUSTIFICATION AND IN MITIGATION: See *King v. Root*, 21 Am. Dec. 102, note 114, where the other cases in this series are collected.

WHITE v. GAY.

[9 NEW HAMPSHIRE, 126.]

TERM LOT, WHEN USED UNQUALIFIEDLY, MEANS a lot in a township, as duly laid out by the original proprietors, especially if it is said to be a lot in a certain range or right.

INCONSISTENT BOUNDARIES IN DEED, WHICH ONE OF, RETAINED.—Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing design manifested on the face of the deed, and the least certainty must yield to the greater certainty in the description.

REPUGNANT CLAUSE IN DESCRIPTION, WHEN REJECTED.—Where an estate is clearly and explicitly described in a deed, and a subsequent clause is added as further descriptive of it, but which is of doubtful import, or repugnant to the first clause, such latter description will be rejected.

PETITION for partition. The opinion states the case.

Atherton, for the petitioners.

Farley, for the petitionees.

UPHAM, J. This case turns upon the construction to be given

to the deed from the Penhallows to Isaac Smith, dated July 2, 1825. The deed conveys an undivided portion of a certain lot, specifying the right in which it is situated, and the number of acres it is said to contain. After this description, the following clause is added: "And is adjoining land of Ebenezer Gay, Mansel Alcock, William Shearer, and Seth Gay;" and the question arises, whether this is part of the original description of the land, or is merely a specification of additional particulars applicable to the lot.

It is often the case, after giving a full description of land conveyed, the grantor adds, and is the same land conveyed to me by deed of a certain date, recorded in the county records in such a book and page, or other additional matter of information. In this case, after giving a description of the land, a supplementary clause is added, and "is adjoining land of Ebenezer Gay," etc. This phraseology does not purport to give the boundaries of the land, but is manifestly, as we think, merely accessory to the principal description. If this be the true construction of the deed, then a particular lot was designed to be conveyed, and the expression used in such connection is technical, and could mean no other than one, among various lots, duly laid out by some prior survey.

Such being the case, it becomes necessary to ascertain from other sources, in the deed or elsewhere, what lot is meant, as no number is given. It is defined to be a lot of land adjoining the land of Ebenezer Gay, Mansel Alcock, William Shearer, and Seth Gay. This description is applicable to lot number thirty-eight, in all particulars except that it does not adjoin land of Ebenezer Gay; but it is impossible to apply the description to any other lot. The only way in which such description can be made applicable to any tract of land, is to add to number thirty-eight two additional gore lots, and part of lot number thirty-nine, making three lots and part of another lot, instead of one, containing in all two hundred and thirty-three acres; but this would overrule what we conceive to be the previous description of the deed, and would render the term lot wholly unmeaning, as used in any technical sense, besides very much exceeding the prescribed quantity of land.

We sometimes use the term lot in a restricted sense, limiting it at the time, as a wood lot, a house lot, or store lot; but where the term is used unqualifiedly, especially if said to be a lot in a certain range, or right, it is almost uniformly used in a

technical sense, and means a lot in a township as duly laid out by the original proprietors. Such, we have no doubt, was the intention here; and, number thirty-eight being the only lot to which the description can apply, it must be considered as the lot designed to be conveyed; and that portion of the description, where it is said to be adjoining land of Ebenezer Gay, is a mistake, and must be rejected.

The well-known rule of law is applicable here, that where conflicting descriptions can not be reconciled, that construction must be adopted which best comports with the manifest intention of the parties, and the circumstances of the case: *Loring v. Norton*, 8 Green, 61; *Tenny v. Beard*, 5 N. H. 58; *Preston v. Bowmar*, 4 Greenl. 429.¹ Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing design manifested on the face of the deed, and the least certainty must yield to the greater certainty in the description: *Cholmondeley v. Clinton*, 2 Barn. & Ald. 625; *Massie v. Watts*, 6 Cranch, 148; *Benedict v. Gaylord*, 11 Conn. 335; *Gates v. Lewis*, 7 Vt. 511; *Worthington et al. v. Hayley et al.*,² 4 Mass. 205.

It is also a rule of law, that if an estate is clearly and explicitly described in a deed of conveyance, and a subsequent clause is introduced, as farther descriptive of the estate, but which is of doubtful import, or repugnant to the first clause, such latter description will be rejected: *Culler v. Tufts*, 3 Pick. 272; *Cartwright v. Amatt*, 2 Bos. & Pul. 43.

These principles sustain the construction we have given to the deed from the Penhallows to Smith, limiting the title of the petitionees, under such deed, to lot numbered thirty-eight. The land, therefore, included in the petition for partition, not having been conveyed by said deed, remained the property of the Penhallows, until conveyed by them to the petitioners, April 3, 1834. The petitioners are, therefore, entitled to judgment for partition for the interest so conveyed to them, being thirty-three and one third forty-eighth parts of the same. Also, for their portion of land derived by title from Edward Cutts, being in all forty-one and one third forty-eighth parts of the land named in the petition.

It has been said, that, if the construction of the deed from Smith is limited to lot numbered thirty-eight, then Seth Gay, the only one of the petitionees who has pleaded in the case, has no

1. *Preston v. Bowmar*, 2 Bibb, 493.

2. *Worthington v. Hylier*.

title in the land embraced in the petition, and therefore a verdict should have been taken in his favor; but he should have disclaimed, and have set up no title to the tract. Not having done this, it is too late now to take the exception.

Judgment for partition.

Inconsistent description in deed: See *Brand v. Daunoy*, 19 Am. Dec. 176;
For v. Handy, 11 Id. 101.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

TITUS v. WHITNEY.

[1 HARRISON, 85.]

JUDGMENT RENDERED "FOR THE PLAINTIFF," BY A JUSTICE OF THE PEACE, is necessarily implied and understood to be against the defendant named in all the other proceedings in the case.

JUDGMENT OF JUSTICE OF PEACE WILL NOT BE REVERSED merely because the copy of the summons served upon the defendant named ten A. M., instead of ten P. M., as the hour for his appearance, where he did not appear at any hour on that day, and there is no ground to infer that he suffered injury by reason of the mistake.

CERTIORARI to a justice of the peace. The opinion states the case.

By Court, **RYERSON, J.** I have searched earnestly for some good ground for reversing this judgment; but I have not found any, either in the reasons assigned, or any others discovered in the record. One objection urged, was, that the summons was returnable at two P. M., according to which hour, the justice proceeded to trial and judgment: whereas, the copy served on the defendant, was to appear at ten A. M. as was alleged. But there is no ground to infer any injury to the defendant. He never appeared at all before the justice, pending the suit; either at ten A. M. or two P. M., or any other hour. He can not pretend therefore, that he was misled by the service. Had he appeared at ten o'clock, he would have learned the error, and been effectually saved from all harm therefrom. Or if he had not then received correct information, the court would have perceived that he had been unfairly dealt by, and would have intended, that he had received damage, in order to relieve him from the judgment

thus obtained. But it is not necessary to express any final opinion on this point; for the fact is not established in such manner, that the court can notice it.

Again, it was urged, that there is no judgment against any one. The language of the justice's docket is, "after duly considering the evidence, I gave judgment for the plaintiff, for the sum of," etc. But no doubt can possibly arise on this entry, after a recital of the parties to the action and all the previous proceedings, in a concise and lucid manner. It would therefore be too much to say it is not sufficiently manifest, against whom the judgment is rendered. It must necessarily be implied and understood to be against him, against whom all the other proceedings were taken. The judgment should therefore be affirmed.

HORNBLOWER, C. J., and FORD, J., concurred. Judgment affirmed.

OVERSEERS OF ALEXANDRIA v. OVERSEERS OF BETHLEHEM.

[1 HARRISON, 119.]

ATTAINING AGE OF TWENTY-ONE IS NOT IPSO FACTO EMANCIPATION, in respect to the question of settlement; so long as the child remains single, enters into no contract inconsistent with the idea of his being a member of, and in a subordinate situation in his father's family, acquires no settlement for himself, and makes his father's house his home, no matter what his age may be, he will follow any newly-acquired settlement of his father.

IDIOT LIVING WITH HIS FATHER MAY DERIVE A SETTLEMENT, no matter what his age may be.

CERTIORARI. The opinion states the case.

Saxton and Southard, for the plaintiffs.

Green and Halsted, for the defendants.

By Court, HORNBLOWER, C. J. The pauper is an idiot, or at most of such feeble mind that she has never been able to take care of herself. She is now upwards of fifty years of age, and has always resided with her father, as a member of his family. She was born in Bethlehem, where her father then resided; but he never had any settlement, either there or elsewhere, until the year 1812, when he purchased an estate in Alexandria, and acquired a settlement there; his daughter being then more than twenty-one years of age. He is now eighty-five years old, and

being unable to provide for and take care of his daughter, she was removed, by an order of two justices, from Alexandria to Bethlehem, the place of her birth. That order was quashed by the quarter sessions of Hunterdon; and this certiorari is brought by the overseers of the township of Alexandria, for the purpose of reversing that order. The questions raised at the argument were:

1. Whether the simple fact, of attaining the age of twenty-one years, is an emancipation, and deprives the child of the benefit of a subsequently acquired settlement by the father; and,

2. Whether, if that is the general rule, the case of an idiot does not form an exception to it.

The cause was extensively argued, and a great many cases cited by counsel on both sides, but it seems to me a very plain case. It is true there appears to be some confusion in the books, arising from the manner in which the rule has been expressed by some of the judges, and especially from what is reported to have been said by Lord Kenyon in *Rex v. Offchurch*, 3 T. R. 116; *Rex v. Whitton*, Id. 355; and in *Rex v. Collingbourne*, 4 Id. 199. But in *Rex v. Roach*, 6 Id. 245, 251, his lordship took occasion to explain himself, or rather to say, that he must have been misunderstood; and thought he could not have said what had been reported of him in *Rex v. Whitton*, "because it never was his opinion, that the mere circumstance of the son's attaining the age of twenty-one, was an emancipation, so as to prevent his having a derivative settlement, gained by his father afterwards, if the son continued to live with the father;" and then he adds, "for if the son, with unbroken continuance, remain with, and a member of, the father's family, he is not emancipated."

The rule I take to be this: that nothing emancipates a child, in the sense here spoken of, under the age of twenty-one years, but marriage, or acquiring a settlement of his own; but after attaining the age of twenty-one, he may also be emancipated by separating himself from and ceasing to be a member of his father's family. But so long as the child continues single; enters into no contract inconsistent with the idea of his being a member of, and in a subordinate situation in his father's family; acquires no settlement for himself, and makes his father's house his home, so long, whatever may be his age, he will follow any newly acquired settlement of his father. The age of twenty-one is fixed upon, and spoken of in the books, not as the period when emancipation takes place; but as the age, at or subsequent to which, the child may emancipate himself by with-

drawing from his father's family, and setting up for himself in the world. And this is reasonable, for when a man acquires a settlement, it is not for himself alone, but for his family; and his children, whether young or old, so long as they are unmarried and reside with him, are members of his family.

Not a single case can be found in which the age of twenty-one years has, *ipso facto*, been adjudged an emancipation, in respect to the question of settlement. On the contrary, in *Eastwoodhey v. Westwoodhey*, 1 Stra. 438, and 3 Burns Just. 370; *Budgden v. Ampthill*, Burr. Set. Cas. 270; and 3 Burns Just. 372; *Rex v. Heath*, 5 T. R. 583; and in *Rex v. Everton*, 1 East, 526, though the paupers in those cases were more than twenty-one years of age, when the new settlements of their respective fathers were acquired, yet the decisions of the courts were made upon entirely other grounds. In *Rex v. Roach*, 6 T. R. 247, the fact of the pauper's being of full age before her father acquired his last settlement, was not relied upon, even by counsel; and the case was decided solely upon the ground, that she had separated herself from her father's family, after she had attained the age of twenty-one years. In *Rex v. Walpole*, 1 Bl. 669, the pauper enlisted as a soldier, while under age, but did not return to his father until after he was twenty-one, and the father's newly acquired settlement was denied to him, not because he was of full age; but because he remained absent after he was so. So too in a more recent case: *Rex v. Hardwick*, 5 Barn. & Ald. 176; 7 Eng. Com. L. 62; where the son was drawn as a militia-man, and was not discharged until after he was twenty-one years of age; though in this case I should have doubted if his absence after that period was not voluntary.

Upon the whole, I am satisfied the general rule is, and always has been, as I have stated; that attaining the age of twenty-one is not *ipso facto* emancipation. But then, the counsel for the plaintiffs contend, that as the pauper was not capable of making any election after she attained her full age, and thereby emancipating herself, the law ought to elect for her, and judge her emancipated at that age. If it would be for her benefit, perhaps we ought to do so: but that is not the case. The very fact that she has never been capable of electing to separate herself from her father's family, is the reason why the law considers her still a member of that family. If she had always continued a minor, she would have continued unemancipated by separation, because she was a minor, and not capable of choosing to separate herself from her father's family; and precisely for the

same reason she now remains unemancipated. In *Rex v. Roach*, 6 T. R. 250, the counsel put the case of an idiot, living with his father, and take it for granted he may derive a settlement, let his age be what it may. This was not denied; and in a recent case, *Rex v. Much Cowaine*,¹ 2 Barn. & Adol. 861; 22 Eng. Com. L. 201, this very point was fully and solemnly ruled in the king's bench. This case, though not authority, is a clear precedent, falling in entirely with my views and feelings.

The order of the sessions must therefore be affirmed.

FORD and RYERSON, JJ., concurred. Order affirmed.

Cited and approved in *Brown v. Ramsay*, 5 Dutch. 117, 120, to the point that arriving at the age of twenty-one is not *ipso facto* emancipation.

WHITE v. WHITE.

[1 HARRISON, 202.]

DOWER—DEVISE, WHEN REGARDED AS MADE IN LIEU OF.—Where a testator bequeaths to his wife one room in his dwelling-house, and a comfortable maintenance out of his real estate during her life or widowhood, and then devises to his two sons all his real estate, to be equally divided between them, such bequest to the wife will be regarded as made to her in lieu of her dower.

DEVISE IN LIEU OF DOWER need not be expressly declared to be such in a will, if the intention to make it so be apparent, and the claim of dower would be inconsistent with its other provisions.

WIDOW TO WHOM DEVISE OF REAL ESTATE IS MADE IN LIEU OF DOWER must, within six months after the probate of the will, dissent from such devise, or she will be barred of her action for dower.

DEVISE OF ONE ROOM IN A HOUSE is a devise of real estate.

RELEASE OF DOWER MUST BE BY DEED, and therefore a parol release is not sufficient to bar an action of dower.

RELEASE OF DOWER IN ONE MOIETY OF A FARM will not release it in the other moiety; nor will a release to one tenant in common for his share release it to another tenant in common who has a different share.

DOWER. The opinion states the case.

Hartshorne, for the demandant.

Randolph, contra.

By Court, FORD, J. This is an action for dower in a hundred acres of land; the count is in the usual form; the tenant pleads five pleas in bar; the demandant demurs to each plea, and thus its sufficiency is put in issue, to the court. It ap-

1. *Rex v. Much Cowarne*, 2 Barn. & Adol. 861; S. C., 22 Eng. Com. L. 302.

pears that the husband in his will, made the following provision for his wife: "I give and bequeath to my beloved wife Eleanor White, all the property that she had or brought with her when I married her, and I further order that she shall have one room in my dwelling-house, and a comfortable maintenance out of my real estate, during her natural life or widowhood. And I give and bequeath unto my two sons, Richard White and Peter White, all my lands and buildings, to be equally divided between them in quantity and quality; and I further order that my son Richard White, shall have my wagon and horses, and I also give to my son Peter White, my other wagon, and one yoke of oxen, yoke or yokes."

The tenant avers in his first plea, that after the death of the husband, the widow accepted of the bequests made to her in the will; it further avers that those bequests were made to her in lieu and satisfaction of her dower. It is observable that in the will, they are not expressed to be in lieu of her dower, and the demandant alleges a reason, why they were intended not to be so; that the estate consisted principally in wood land, from which she could obtain nothing beside fuel; and knowing that one third of the residue, after deducting for labor and tillage, could not supply the exigencies of her condition, her husband superadded these bequests in his will, without expressing the slightest intention that they should be in lieu of her dower.

It was holden in former times according to 1 Inst. 36, b, that "a devise by will can not be averred to be in satisfaction of dower, unless it be so expressed in the will;" but modern decisions do not maintain this dictum; they hold that the will of a man is his intention, and whenever that intention manifestly appears, though not directly expressed in words, it shall prevail; therefore that a devise may be averred to be in lieu of dower, without being so expressed in the will, if the testator manifestly intended it to be so. It was abundantly established in the case of *Villa Real v. Galway*, 1 Bro. 292, that a devisee can not claim under a will, which is an affirmation of it, and also claims so contrary to it, as to overthrow or disturb the testator's material provisions therein made. The cases to this effect are collected in 4 Kent Com. 56, where he infers from them with great clearness, the general rule, thus, "that a testamentary provision must be declared in express terms, to be in lieu of dower, or, that intention must be deduced by clear and manifest implication from the will, founded on the fact, that the claim of

dower would be inconsistent with the will, or so repugnant to its dispositions, as to disturb and defeat them."

The same doctrine is recognized by Chancellor Vroom, in *Stark v. Hunton*, 1 Sax. Ch. 225. Now if the demandant shall be allowed to recover dower in the real estate, it will disturb and prevent the testator's own provisions from being carried into effect. He has provided for her a comfortable maintenance, and has made it a charge upon his whole real estate, so that it goes with the estate as a burden, into the hands of his two sons, Richard and Peter, the devisees; they are to furnish the maintenance, and in consideration of it, they are to have the whole estate. Now if the widow takes one third of it for her dower, and they obtain only two thirds of it during her life-time, it wholly deranges the testator's settlement, which was that they should have the whole estate, and be liable in respect of it, for the whole of her maintenance. The will can never be executed according to his intent, for the sons will have only two thirds of what the testator intended; and the uttermost for the widow, would be only two thirds of the maintenance provided and intended for her. The testator's settlement would be broken up, and some other would have to be substituted in the place of it. Either the widow must lose her whole maintenance, or it must be apportioned on the sons according to the proportional part of the lands they obtain. If she by an act of her own, takes one third of the land away from the sons, does she not discharge them from any maintenance? "If a man having a rent charge, purchases part of the land out of which the rent issues, the whole rent is thereby extinguished, because willfully and by his own act, he has prevented the operation of the charge on the land, according to the original grant: "Litt., sec. 222; Gilb. on Rents, 152. If so, her claim of dower contravenes the will, by defeating the very maintenance the testator has provided for her. If it be said that dower accrues by operation of law, not by her own act, and therefore that the charge shall not be entirely lost, but apportioned on Richard and Peter, according to the estate they actually receive, even this will defeat the disposition made by the testator, according to which the sons were to have all the land, and to furnish the whole of the maintenance. But the possibility of an apportionment, is questionable. A sum of money is apportionable into certain parts, but how will it be done with the thing called a "comfortable maintenance"? the expense for which, will vary

with peace or war prices, with dearth or plentiful seasons, nay with her own personal condition, whether it be that of sound health, or that of decrepitude and helplessness. What wisdom could make a permanent apportionment, of two thirds, of such an ever-varying thing as comfortable maintenance? But even if it could possibly be done, it would entirely defeat the testator's arrangement. Therefore the plea is manifestly right in the averment, that the bequests in the will to the widow, were intended by the testator, to be to her in lieu of her dower. Judgment must be accordingly rendered on this plea for the defendant; nevertheless the demandant will be allowed to withdraw her demurrer, and to traverse her acceptance of these bequests, pursuant to the agreement of the parties, if she shall deem it advisable to do so.

The second plea avers, that the husband devised to the demandant, part of his real estate, to wit: a room in his dwelling-house, and a comfortable maintenance out of his real estate; that he did not express whether such devise was to be in lieu of dower or not; that he devised over all his real estate; that the demandant survived him; that probate was made of his will; and that within six months after probate thereof, the demandant did not, in writing, express her dissent to receive the real estate so devised to her, in satisfaction and bar of her right of dower, as by the statute she was bound to do. To this plea, there is a demurrer admitting the plea to be true, that such devises were made to her, but denying that they conveyed to her any real estate. The statute provides (R. L. 677, sec. 1), that if a devise be made to the widow, of any real estate, whether for life or otherwise, it shall bar her right to dower in lands devised to others, unless she dissent in writing within six months after probate, to receive them in lieu of her dower. The demandant insists that the testator did not devise to her any real estate, and that the plea shows none. The "comfortable maintenance," is denied to be either land or real estate, within the meaning of the statute. And as to the room in the dwelling-house, it is argued that the word house does not include any land, within its legal signification. In support of this position, we are referred to 2 Bl. Com. 19, where the author observes, that, by a grant of a castle or messuage, and the like, nothing else will pass, except what falls with the utmost propriety under the term made use of. Now the author does not say that the land at the foundation of the castle does not properly fall under the term, or the grantee could have by the grant only a

castle in the air: he means that nothing more of land, than precisely what the castle covers, will pass by the word castle or house, unless the word appurtenances, or something equivalent to it, is mentioned in the grant. The case of *Hill v. Grant*,¹ 1 Plowd. 170, proves that the foundation of a house is in law considered a part of it; but even with that allowance, the passage in the commentaries has been considered too narrow, for it is laid down in 1 Inst. 5, that a grant of a castle may convey a manor. But this is not the case of a grant; we are here considering a will, wherein the gift of a house may convey all the land within the curtilage: *Carden v. Tuck*, Cro. Eliz. 89; *Doe v. Collins*, 2 T. R. 498. On the same principle that a house is real estate, a room must likewise be so, in a house, as having its share in the foundation. If the widow should be put out of the room, may she not recover it in ejectment and have a writ of possession? Ejectment will lie for "a chamber in the second story" of a house, if a proper designation of the house be given; even "*de una rooma*" has been holden good: Run. on Eject. 24, 25. Then this is a devise of real estate, from which the demandant did not dissent, either in the manner or within the time, required by the statute; her right of dower is therefore necessarily barred by law, and judgment on this plea must be rendered for the defendant.

The third plea avers a consideration, for which the demandant agreed to release her dower; and the fifth plea avers that she did release it; not showing whether the agreement in the former plea, or the release in the latter, was in writing or by parol. For this reason there is a special demurrer to each. I am of opinion that neither of them is sufficient to bar the action, and that they must be set aside. An agreement to release dower, can not operate as a release, until it be executed, it being only an agreement, which, if broken, may subject the demandant to an action on the case for damages; but can not convey her title to land. Also, if the defendant pleads a release, he must show that it is by deed, and make a profert of it in court, otherwise he deprives the adverse party of the right to see it and hear it read and of the proper means of answering it.

The fourth plea avers that the premises consist of a farm, devised to the said Richard and Peter, equally to be divided between them, that the premises were in the sole possession of Peter, on a certain day, when, by a writing under her hand, the demandant released her claim of dower in said farm, on the part

1. *Hill v. Grange*.

of the said Richard; by means whereof Richard's portion of the said farm, then in the occupation of Peter, "and the said farm" released and discharged from her claim of dower. The demandant demurs to this for duplicity, in that it first avers a release of dower in Richard's moiety, and secondly, a release of it in the whole farm. But the allegation of duplicity is certainly a mistake; the plea presents only a single traversable fact, namely, a release of dower in Richard's moiety; the subsequent *virtute cujus*, only shows the operation and effect of it, in law, which can not be traversed or put in issue to the country. Neither is the plea argumentative, as where one fact is stated, that another fact may be inferred from it. It is admissible to state a fact together with the operation in law. But there is a substantial objection to it, that a release of dower is pleaded without any profert of the deed. Moreover a release of dower in one moiety of a farm, will not operate in law, as a release of it in the other moiety; nor does a release of it to one tenant in common for his share, operate in law as a release of it to another tenant in common who has a different share. It has no analogy to releasing one of many joint and several obligors, where there exists but one debt, which becomes by a release to one, extinguished, as much as if he had paid it in money. Judgment must therefore be rendered, that this plea is insufficient to bar the action.

HORNBLOWER, C. J., and RYERSON, J., concurred.

Judgment for the defendant on the first and second pleas, and for the demandant on the third, fourth, and fifth pleas.

Cited and approved in *Van Aredale v. Van Aredale*, 2 Dutch. 404, 419, to the point that a devise of a comfortable maintenance out of real estate, for a wife during her life or widowhood, evidenced the testator's intention that such devise should be in lieu of dower, although it was not so expressly stated in the will; and in *Colgate v. Colgate*, 8 C. E. Green, 372, 380, to the point that a provision for maintenance out of real estate is inconsistent with, and bars dower.

DEVISE IN LIEU OF DOWER: See *Jackson v. Churchill*, 17 Am. Dec. 514; *Hall's case*, Id. 275, note 277, where the cases relating to this subject are collected.

RELEASE OF DOWER, EVIDENCE OF: *Shaller v. Brand*. 6 Am. Dec. 482.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

MULLANY v. MULLANY.

[3 GREEN CH. 16.]

TESTATOR'S INTENTION TO DEPRIVE DEVISEE'S HUSBAND of his estate by the curtesy, must clearly appear from the will, or it will not be allowed, and the fact that he devises to his daughter a farm, with the limitation that it shall not be "subject to the sale or disposal of her husband in any way, manner, or form whatsoever," is not sufficient to show that he intended to bar the tenancy by curtesy, when the husband was, at the time of the testator's death and for several years previous, in the occupation and possession of the premises.

COURT OF EQUITY IS AS MUCH BOUND BY POSITIVE RULES and general maxims concerning property, as a court of law.

TESTATOR CAN NOT BY WILL CREATE AN ESTATE which, by the rules of the common law, he could not in his life-time create by deed.

ONE WHO DEVISES FEE-SIMPLE ESTATE PARTS with all the interest he had, and will not be permitted to say that such estate shall not be subject to all the restraints imposed upon it by law.

TESTATOR WHO DEVISES TO FEME-COVERT AN ESTATE IN FEE can not deprive her husband of his estate by the curtesy, by any words of restraint or limitation in the will.

BILL in chancery. The opinion states the case.

Frelinghuysen, for the complainants.

Miller, for the defendants.

DICKERSON, Chancellor. In this case, the bill charges, that the complainants are the children of James R. Mullany, one of the defendants, by his late wife, Maria Mullany, deceased, who was the daughter of Elias Berger, late of the county of Bergen, deceased. That on the first of March, 1816, the said Elias Berger made his last will and testament, and, among

other matters, devised as follows: "I give and bequeath unto my daughter Maria, the wife of James R. Mullany, one other equal third part of the whole of the income arising from my estate, real and personal, to be paid to her, and to no one else, punctually, yearly and every year during the term of her natural life; which annual allowance is intended for her use, maintenance, and support, and for no other purpose whatever, and is, consequently, not to be subject to the control or disposal of her husband in any respect. Then, immediately after the decease of my wife, Mary, they, my aforesaid daughters, Jane and Maria, shall be entitled to an equal participation of that equal third part of the income arising from my estate, real and personal, which is hereinbefore set apart for the maintenance and support of my said wife, Mary; which my executors are hereby directed to pay unto them respectively, and to no other person or persons whomsoever, yearly and every year, during the term of their natural lives, respectively, for their own use, maintenance, and support, and for no other purpose whatever."

On the sixth of August, 1823, Elias Berger made a codicil to his will, in the following words: "I do give, devise, and bequeath unto my daughter Maria, the wife of James R. Mullany, as an equivalent, or to make her equal with her sister Jane, all that certain farm, with the buildings thereon, situate at Bergen point, in the county of Bergen, and state of New Jersey, now in the occupation and possession of the said James R. Mullany, which lies, etc. (describing it). To have and to hold the same unto my said daughter Maria, her heirs and assigns, forever; not in any manner subject to the sale or disposal of her said husband, in any way, manner, or form whatever."

Elias Berger, the testator, died in October, 1826, leaving his said will and codicil in force; and Maria Mullany, his daughter, died in October, 1830, leaving her husband, James R. Mullany, one of the defendants, and the complainants, her heirs at law, surviving her.

There are other charges in the bill, of which it is not necessary now to take notice, as I understand that upon the demurrer filed, the only question submitted is, whether the defendant, James R. Mullany, is tenant by the curtesy of the premises described in the codicil.

The first question which presents itself, refers to the intention of the testator; whether he intended by this will to exclude the husband from the curtesy. And in order to arrive at that intention, it is proper to consider the situation of the parties at

the time of making the will, and to compare expressions used in the codicil, with expressions upon similar subjects in other parts of the will. The rule of construction upon this subject is, that as it is against common right, "the instrument under which it is made must clearly speak the devisor's intention to bar the husband, else it can not be allowed:" Clancy, 262.

As to the situation of the parties, it appears by the codicil itself that the defendant, Mullany, was in the occupation and possession of the premises at the time of making the codicil; and as it appears by the bill that he was in possession after the death of his wife, I take it for granted that his possession was uninterrupted from the time of making the codicil until after the death of his wife, and that she lived with him. Under these circumstances, it can not be presumed, unless most clearly expressed, that the testator intended to change the situation of the parties as to the manner of occupying and enjoying the property, after his death, which he had sanctioned for the last three years of his life, and that after the making of this codicil. Nor do I think that the words of this codicil necessarily convey that idea, and particularly when compared with other expressions used in the former part of the will. When bequeathing to Mrs. Mullany the third part of the income of his estate, both real and personal, for her life, he directs it "to be paid to her and to no one else;" and declares it to be "for her use, maintenance, and support, and for no other purpose whatever," and "consequently not to be subject to the control or disposal of her said husband in any respect." But in the codicil, when devising the farm to her, the only words of limitation or restraint are, that it shall not be "subject to the sale or disposal of her husband in any way, manner, or form whatsoever."

As the defendant, Mullany, was at this time in the quiet and uninterrupted possession of the farm, with his wife and family, and as the testator in this latter devise has used the terms "sale and disposal," instead of "control and disposal," used in the former part of the will, I can not believe that he intended to exclude him from the use and enjoyment of the farm during the life-time of his wife, nor to debar him of his rights after her death. But the more reasonable construction appears to me to be, that he intended to make him use and occupy it for the benefit of himself and family, and not to sell or quit it. If he had intended to exclude or debar him from all right or interest in the real estate, it is fairly to be presumed that his terms of

exclusion would have been as strong, at least, as those used with regard to the personal estate.

In the case of *Wills v. Sayers*, 4 Madd. 409, there was a bequest of a sum of money to a *feme-covert*, "for her own use and benefit;" and yet the vice-chancellor, Sir John Leach, decreed that it was not for her "separate use," because in the same will there was a bequest to her of other moneys "for her sole and separate use." There the construction given to the former expression was evidently controlled by the greater particularity of the latter.

But if the intention of the testator had been more clearly expressed to debar the defendant, Mullany, from his curtesy, another question arises, how far that intention shall prevail? In other words, if a man devise to a *feme-covert* an absolute estate of inheritance in fee simple, and annex a condition which is inconsistent with the legal effect of that estate, will that condition be effectual in equity? Upon this subject, the correct rule for the construction of wills, according to my view, is, "that such an estate, which can not by the rules of common law be conveyed by act executed in his life-time by advice of counsel learned in the law, such an estate can not be devised by the will of a man who is intended in law to be *inops consilii*:" *Corbet's case*, 1 Co. 85.

It is true that the intention of parties should be greatly regarded in giving construction both to wills and deeds; but I can see no reason why a man, without the benefit of advice and counsel, should be permitted to convey an estate by will, which he could not do by deed, and with the benefit of counsel; nor can I believe that a court of equity can, consistently, dispense with or disregard those general rules of law upon which our titles depend.

In the case of *Long v. Laming*, 2 Burr. 1108, Lord Mansfield says: "A court of equity is as much bound by positive rules and general maxims concerning property (though the reason of them may have ceased), as a court of law; and if the intention of a testator be contrary to the rules of law, it can no more take place in a court of equity than in a court of law; if the intention be illegal, it is equally void in both." And Lord Chancellor Cooper, in the case of *Watts v. Ball*, 1 P. Wms. 109, decreed, "that trust estates were governed by the same rules, and were within the same reason as legal estates, and if husband would be tenant by the curtesy at law, so in equity." And he adds: "if there were not the same rules of property

in all courts, all things would be, as it were, at sea, and under the greatest uncertainty."

And the same principle is established in the later case of *Banks v. Sutton*, 2 P. Wms. 383-397, 632;¹ in which case, after stating the rule, the master of the rolls says, there is no exception to the rule, nor any reason why there should be. And Maddock, in the first volume of his treatise, page 452, confirms the rule, and states the only difference to be, "that where a trust estate is created by deed or will, it is determined upon in courts of equity, and where a conveyance or devise is of a legal estate, it is determined on in courts of common law, but the decision in each court in the construction of words of limitation is guided by the same rules."

If, therefore, courts of equity are as much bound by positive rules and general maxims concerning property, as courts of law, and if the rules of construction are the same in both courts, in order to arrive at the true construction and legal effect of this will, it is proper to inquire, in the first place, as to the rule in the courts of common law.

The earliest case that I find upon the subject, is that of *Sir Anthony Mildway*, 6 Co. 41; where, after great discussion, it was resolved: "That if a man made a gift in tail, on condition that he shall not suffer a common recovery, that condition is repugnant to the estate tail, and against law. Also if a man made a gift in tail to a *feme* upon condition that the husband of the tenant in tail after issue shall not be tenant by the curtesy, this condition is void."

And in a later case, in 1798, the same doctrine is maintained. I refer to the case of *Goodill v. Brigham*, 1 Bos. & Pul. 192, where a devise was made to a *feme-covert* in fee, with a declaration in the will, that "she might give, sell, and dispose of the same, as she should think proper, and also give acquittances and other discharges, so as not be under the control of her own husband, who should not intercede or meddle with any of the estate or effects thereby given to the said *feme-covert*." It was unanimously ruled, "that such a power was void, as being inconsistent with the fee given to her in the first instance."

And in this case I refer to the views of Justice Buller, as particularly applicable to the present case. He says: "The devisor seems to have had two intentions, which are inconsistent; one was to give an estate in fee to the *feme-covert*, the other to qualify it in such manner as that her husband should have no power over

1. 2 P. Wms. 700.

it. The last is contrary to the rules of law: the court will, therefore, carry into effect the first intention, and reject the other."

From these cases, which have not, to my knowledge, been overruled, I infer that those incidents which by law are inseparably annexed to an estate, can not be prohibited by any condition or limitation expressed in the deed or will; and that when a man gives a fee simple, he has parted with all the interest which he had, and can not be permitted to say, that such estate shall not be subject to all the restraints imposed upon it by law.

If this doctrine be correct, the defendant, Mullany, would be entitled to his curtesy in a court of law; and if the rule cited from *Corbet's case*, be the true rule of construction, he would also be entitled in a court of equity. And upon examining the decisions in courts of equity, I think they will be found to sustain that rule.

There is a class of cases respecting the rights of married women over their separate property, and showing how far they may be considered as unmarried; but these cases apply to personal property, and the rents and profits of real estate during life, which would by law belong to the husband upon marriage.

It will be remarked, that by the will of the testator in this case, the farm is not given to the separate use of the wife during life, but it is given to her in fee; they being at the same time in the use and enjoyment of it; and the only condition or limitation annexed by the will, is, that he shall not sell or dispose of it, in any way, manner, or form. I refer to this part of the case to show, that they had an actual seisin, both in fact and in law; could have sold the property and given an absolute, indefeasible title in fee to the purchaser, and the complainants must take by descent and not by purchase. In order to avoid the effect of marriage upon the property of the wife, resort has been had to the intervention of trustees, and courts of equity have declared that where a trust was intended and no trustee named, they would supply the deficiency, so that by operation of law trustees were raised up to support and protect the rights of those who were intended to be benefited by a devise or gift.

And if the complainants can prevail in this case, it must be upon the idea that, under this devise the husband became trustee for his wife during her life, and now for the complainants, who are her heirs-at-law. But it will be remarked, that if it be so, it must be a trust executed; for the testator certainly did not contemplate any further conveyance to perfect the title, and

there is nothing for this court to do, in that respect, nor is there anything asked for by the bill, which could give this the character of an executory trust.

In examining the decisions of courts of equity upon the subject, the strongest case for the complainants which I find, is that of *Bennet v. Davis*, 2 P. Wms. 316, where a devise of lands in fee was made to a married woman, for her separate and peculiar use, exclusive of the husband, "to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have those lands in case he survived the wife, but that they should, upon the wife's death, go to the heirs." In this case the master of the rolls said it was a trust in the husband, created by the act of law, and decreed that he should join in a conveyance to a trustee, for the separate use of his wife, etc. But it is to be remarked that the question arose in the life-time of the wife, between her and the creditors of her husband, who had become a bankrupt, and although the court might, with great propriety, protect the property against the creditors of her bankrupt husband (which is the point of the case), it does not follow that he would have been barred of his curtesy. It is true that the master of the rolls, in delivering his opinion, remarks that "although the husband might be tenant by the curtesy, yet he should be but a trustee for the heirs of the wife." But this is an expression not called for by the case, and therefore not entitled to much weight, and the operation and effect of the case should be limited to the point decided.

In the case of *Darley v. Darley*, 3 Atk. 399, which was determined a few years later, Lord Hardwicke said, that where an estate is given to a husband for the use of the wife, he may be considered as a trustee for her separate use. I refer to this case because it was cited by the counsel for the complainants, but it appears to me to have no bearing upon the present case, as it applied to personal property, and the point decided was, that a father can not apply a legacy left to a child to the maintenance of that child.

I proceed to examine those cases in equity which satisfy me that the same rules of construction should apply in courts of law and equity, and that although the intention of a testator is much regarded in courts of equity, yet that intention will not be carried out, even in those courts, if it is contrary to law.

The first case that I find upon this subject applicable to the present, is that of *Leonard v. Sussex*, 2 Vern. 526. In that case

a devise was made to trustees to convey to A. and B. and the heirs of their bodies, provided that it should not be in their power to dock the entail during their life. Decreed that they must be made only tenants for life, and not have an estate tail conveyed to them, because the estate is not executed, but executory, and therefore the intent and meaning of the testatrix is to be pursued. But the court remark: "Had she by her will devised to her sons an estate tail, the law must have taken place, and they have barred their issue, notwithstanding any subsequent clause or declaration in the will that they should not have power to dock the entail." This case establishes the principle that the intention of a testator can not prevail against the rules of law.

And five years after, Lord Chancellor Cowper, in *Harvey v. Harvey*, 1 P. Wms. 126, doubted the power of devising real estate to the wife's separate use at all, because it was repugnant. And Lord Chancellor Talbot, in the case of *Atkinson v. Hutchinson*, 3 Id. 259, admitted that the devise of a trust must have the same construction as that of a legal estate; and further stated, that, "though the intention of the testator is greatly to be regarded, yet that his intention must ever be consistent with the rules of law."

The case of *Roberts v. Dixwell*, 1 Atk. 607, decided in 1738, appears to me to have a strong bearing upon the question. The testator in that case directs his trustees to convey freehold lands to the *feme-covert* during her life, so that she alone, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband is not to intermeddle therewith. The question was, whether this was a trust executed or executory; for if executed, then *feme* was tenant in tail and husband would have his curtesy, but otherwise if executory. Lord Hardwicke was of the opinion, that conveying an estate tail would defeat the intention of the testator; and he remarks: "That if the wife had been entitled to an estate tail, I do not see but the husband must have been tenant by the curtesy." And as to the question whether the devise to her separate use will bar the husband, he says: "I am of opinion it will not, because here is a sort of seisin in the wife." This case sustains the rule, that the intention must be in conformity with the rules of law, and at the same time points out the distinction between executory and executed trusts. And the case of *Hearle v. Greenbank*, 3 Atk. 695, decided by the same chancellor eleven years later, establishes the same principle, al-

though in some points the opinion of the chancellor in the two last cases appears to have varied.

But the subject was again brought before Lord Chancellor Talbot a few years after, in the case of *Lord Glenorchy v. Bosville*, Talb. Eq. 19, when the court expressly declared, that where an express estate tail is devised, the annexing a power inconsistent with it will not defeat the estate, but the power shall be void; and the lord chancellor remarks, "that in cases of trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same, for there the testator does not suppose any other conveyance will be made. But in executory trusts he leaves something to be done, the trusts to be executed in a more careful and more accurate manner." And in the case of *Austin v. Taylor*, Amb. 376,¹ the lord keeper was of opinion, that in the case of imperfect trusts only the court could make a different construction from a legal limitation. In that case he said, "there was no reference to the trustees; without that ingredient he did not find any case where the court had given a different meaning from what a court of law would on a legal limitation."

But the case of *Morgan v. Morgan*, reported in 5 Madd. 408, is a strong case in support of the view I have taken, and has a striking resemblance to the principal case. It was a case between the father who claimed as tenant by the curtesy, and the son who claimed as heir-at-law to his mother. The lands in question had been the estate of the mother, and previous to her marriage were conveyed to trustees upon trust, "for the sole and separate use of the (wife) mother for life, with power to the mother to appoint the fee by deed or will, and for want of appointment in trust for the mother, her heirs and assigns." The mother died without having made an appointment, leaving her husband and son; of course she took an equitable estate of inheritance. After an argument where all the leading cases upon the subject were cited, the vice-chancellor, Sir John Leach, decided that the husband was entitled to his curtesy, and observed, "that at law, the husband is entitled to the curtesy whenever the wife, during the coverture, is seised of an estate of inheritance, and has issue by the husband capable of that inheritance, and that equity follows the law in the quality of estates."

The vice chancellor also alludes to the cases of *Hearle v. Greenbank* and *Roberts v. Dixwell*, and remarks, "that as the opinions

1. *Austen v. Taylor*.

of Lord Hardwicke in those two cases can not be reconciled, he has recourse to principle and analogy."

He also distinguishes the case of *Bennet v. Davis* from that of *Morgan v. Morgan*, by stating, "that in the latter case the husband is partially and not wholly excluded from the enjoyment of the wife's property;" and remarks, "that the court would have restrained him from all interference with the rents and profits during the life of the wife, but there being no further exclusion expressed in the settlement, the court can have no authority to restrain him from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of the wife." These latter remarks apply with equal force to the case before the court, for the words used in the settlement in the one case, are the same as those used in the will in the other.

I find the same doctrine sanctioned by the authority of Mr. Clancy, in his treatise on the rights of women. In page 282, he says, "that if an estate of freehold be limited to trustees for the sole and separate use of a married woman and her heirs, although such a limitation would entitle her to the rents and profits during the marriage, and would enable her to dispose of them as she thought fit, yet she could not, without the concurrence of her husband, dispose of the reversion, nor could she bar him of his tenancy by the curtesy, if the estate were of inheritance."

This same subject has recently passed under the scrutinizing eye of our late Chancellor Williamson, in the case of *Gibbons v. Trumbull*; and if, in that case, I could find anything conflicting with the views I have taken of this, I should have paused before adopting those views; but I am sustained by that case, as far as it is applicable to this. When treating of the right of Mr. Trumbull as tenant by the curtesy, he remarks, "that at law, to entitle the husband to be tenant by the curtesy, marriage, seisin of the wife, issue, and death of the wife, are necessary requisites; and the construction of trusts being the same in equity as that of legal estates in courts of law, therefore, to entitle the husband to be tenant by the curtesy of a trust estate, there must be the same requisites." And he decides against the claim of the husband expressly upon the ground of want of seisin.

• From a review of all the cases, I conclude that a court of equity is as much bound by positive rules and general maxims concerning property, as a court of law. That in giving construction to a devise, the intention of the testator shall be

regarded, unless it be contrary to the rules of law, in which case it should be considered void, as well in a court of equity as of law. That in cases of trusts executed, or immediate devises, where the trusts are directly and wholly declared by the testator to attach on the lands immediately under the will itself, the construction of the courts of law and equity should be the same.

But in cases of executory or imperfect trusts, which are only directory, or prescribe the intended limitations of some future conveyance, courts of equity in striving to ascertain the intention of testators, have not adhered so strictly to the rules of construction adopted by the courts of law, but have directed those conveyances to be made in such manner as to carry out the intention of the testators, as ascertained from an examination of the whole will. And that a man can not by will create such an estate, as by the rules of the common law he could not, in his life-time, create by deed. And I adopt these conclusions, not only because they appear to me to be fairly drawn from the cases, but because they are in conformity with the dictates of my own judgment.

And as Mrs. Mullany was seised of an estate of inheritance in the premises in dispute during the coverture, and had issue capable of inheriting, and who now claim the inheritance, I am of opinion that at her death Mr. Mullany became tenant by the curtesy of those premises, notwithstanding the words of restraint or limitation in the will, under which she derived her title.

TENANCY BY THE CURTESY, WHERE IT EXISTS: See *Jackson v. Johnson*, 15 Am. Dec. 433, note 450, where the subject is fully discussed.

ANTONIDAS v. WALLING.

[3 GREEN CH. 42.]

GUARDIAN OF INFANT CAN NOT CONVEY real estate of his ward without the special authority of a court of equity.

SUCH CONVEYANCE WILL BE SET ASIDE, although the infant has received the consideration thereof; but in setting it aside, where there is no fraud, the court will restore the parties to their former property and rights as nearly as it can be done.

INFANT WILL, IN SUCH CASE, BE DECREED TO REFUND the consideration money, and to allow for such improvements as were made by a prudent and judicious management of the estate, as by repairing fences and buildings and manuring the land, but not to allow for permanent improvements, such as building houses.

BILL for an injunction. The opinion states the case.

Randolph, for the complainant.

Dayton, for the defendants.

DICKERSON, Chancellor. By the pleadings in this case it appears that Lydia, the wife of the defendant, is the natural daughter of the late John Crawford, deceased; that she was so acknowledged by him, and lived with him until the time of his death; that when she was quite young he conveyed to her a farm, consisting of about thirty-seven acres of land, which is now the subject-matter of controversy; that on the thirty-first of August, in the year 1833, Mr. Crawford, together with his said daughter Lydia, conveyed the premises in question to the complainant, for the sum of one thousand and seventy-five dollars, which was paid over to her, she then being under the age of sixteen years. The complainant had to resort to legal proceedings to get possession of the premises, which were then in the possession of a tenant; and after expending thirty dollars or upward, he obtained possession, and went on to improve the premises to a considerable extent; that in the spring of the year 1834, the complainant was informed that (by reason of the infancy of the grantor, Lydia) his title was not good. He then obtained of Crawford a bond of indemnity, to secure him against any damages which he might sustain by reason of the defect of title. Soon after, Mr. Crawford died; and after his death the defendant, Warren Walling, intermarried with the said Lydia, and commenced an action of ejectment to recover the possession of this farm; and this bill was filed by the complainant to enjoin the defendants from further prosecuting their ejectment, and to confirm the deed made by Crawford and Lydia, his daughter, to the complainant.

The above-stated facts are not controverted; and I am clearly of opinion, that upon this state of the case the injunction should be dissolved and the deed declared void.

The strongest case in support of the deed, is that of *Inwood v. Twayne*, Amb. 419, where Lord Chancellor Hardwicke says, "that guardians and trustees may change the nature of infants' estates under particular circumstances, and the court would support their conduct if the court would do it under the same circumstances; they can not do it wantonly, but where it is manifestly for the convenience of the infant." Even under the principle established in this case, the deed should be set

aside, for it was certainly not "manifestly for the convenience of the infant."

But Chancellor Kent, in the case of *Genet v. Tallmadge*, 1 Johns. Ch. 564, says, "that it is not the general policy of the law that any guardian should have it in his power, under any circumstances, to dissipate the real estate of his ward; the law never allows him any further control than over the rents and profits." And in the later case of *Field v. Schieffelin*, 7 Id. 154 [11 Am. Dec. 441], the same chancellor says, "the guardian in socage of the real estate may lease it in his own name, and dispose of it during the guardianship (and the chancery guardian has equal authority), though he can not convey it absolutely without the special authority of this court, because the nature of the trust does not require it."

With this view of the case it is unnecessary to inquire into rights and duties growing out of the peculiar relation existing between Crawford and the present wife of the defendant; nor is it necessary to inquire under what circumstances a court of equity would direct the real estate of an infant to be converted into personal. But as there is in this case no fraud alleged or pretended, it would be palpably unjust, and contrary to equity and the decisions of courts of equity, that the defendants should have the land and the price of it besides. This deed must therefore be set aside upon fair and equitable terms, and in such manner as to restore the parties to their former property and rights as nearly as it can be done.

If this had been a very recent transaction, and the complainant had neither used nor improved the farm, justice would be done by restoring to him the consideration paid by him. But in this case the defendants have had the use of the money, and the complainant has had the use of the farm, and made improvements thereon, by reason of which, it becomes more difficult to apply the rule in such manner as to do justice to all parties.

Upon examining the testimony in the case, I find great contrariety and uncertainty as to the value of the improvements put upon the premises by the complainant, and also as to the annual value thereof; but it is very evident that the farm at the time of the purchase by the complainant, was in a bad state of cultivation, and that by a judicious course of husbandry he has very much improved its condition; and although the testimony upon the subject is certainly not very conclusive and satisfactory, yet I conclude that by reason of the manner of

cultivation, by putting on marl, making and repairing fences, etc., the place has been improved in value to an amount equal to the interest of the money paid for the farm; and I am therefore of opinion that the defendants, upon receiving the possession of the farm, should refund to the complainant the amount paid, with the interest thereon from the date of the deed. The claim of the complainant to be allowed for the rise in the value of the property can not be allowed; nor am I willing to sanction the principle that he shall be allowed for any permanent improvements which he may have made upon the premises, other than such improvement as arises from a prudent and judicious management of the farm, by repairing the fences and buildings, and manuring the land; and if from the impoverished state of the land and dilapidated state of the fences and buildings, such course of management shall add to the actual value of the premises, without at the same time being of benefit to the tenant, it is but just and reasonable that he should be allowed for it; but his claim for permanent improvements, such as building houses, etc., is liable to the same objections which have ever induced courts of equity to disallow similar claims of mortgagees in possession of the mortgaged premises.

Let it be referred to a master to ascertain the amount paid, with interest. Further directions are reserved until the coming in of master's report.

Order accordingly.

GUARDIAN HAS LEGAL RIGHT TO SELL THE PERSONAL PROPERTY of his ward: *Field v Schieffelin*, 11 Am. Dec. 441.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

SWEET v. JACOCKS.

[6 PAIGE CH. 355.]

JUDGMENT LIENS DO NOT PREVAIL over prior equitable claims on the same property.

ONE OBTAINING AS ASSUMED PROTECTOR of certain illegitimate children, a compromise in their favor, and as the result of such compromise, a conveyance to himself of certain real estate, can not claim that the children had no interest in the property, and that he holds it discharged of the trust.

ONE WHO UNDERTAKES TO ACT AS AGENT for another, can not be permitted to acquire the property for his own benefit; and, on taking a conveyance in his own name, will be adjudged to hold in trust for his principal.

RIGHTS OF CONFLICTING CLAIMANTS to a fund in court, being the surplus resulting from sale of mortgaged property, may be settled by a reference to the master, or by directing a bill to be filed; and one who resorts to a reference to the master can not be heard to complain because other claimants have taken the same course.

JUDGMENT AGAINST OWNER OF EQUITY OF REDEMPTION docketed after decree but before sale, has a lien on the surplus proceeds; but he has not such lien if the docketing is subsequent to the sale.

APPEAL from decree of vice-chancellor, disposing of surplus proceeds of mortgaged property. The premises formerly belonged to John Cornell. He, dying intestate, one fifth of his property descended to the heirs of his deceased daughter Sarah. She had married, and, during the life of her husband, had ten children, two of whom were born while living with her husband, Montfort, and eight while living in adultery with defendant, Jacocks. The latter assuming to act for the younger children, claimed that they were entitled to share in the estate descended from their grandfather, and succeeded in inducing

the two eldest children to recognize the claim, by conveying to him eight tenths of the estate which they claimed through their mother. Jacocks, having thus obtained a conveyance in his own name, mortgaged the premises. Under this mortgage they were sold and a surplus realized. This surplus was claimed on the one hand by the eight younger children, and on the other by Jacocks and his creditors. A reference to the master to ascertain the rights of the respective claimants, resulted in his rejecting the claims of the children, and giving precedence to the judgment-creditors, and after them, to Jacocks. The vice-chancellor, however, on exceptions to the master's report, declared Jacocks entitled to a life estate only, that the younger children should have the residue, and that the judgment creditors could have no rights superior to those of their debtor, Jacocks. Jacocks and one of the judgment creditors appealed.

S. Cleveland, for the appellants.

J. Brush, for the respondents.

WALWORTH, Chancellor. If the judgment of Cleveland was docketed before the sale by the master, it was an equitable lien upon so much of the surplus moneys as F. Jacocks was entitled to, although the judgment was obtained after the decree of foreclosure; as the court would stay the sale upon the application of a creditor having such a judgment lien, on his paying the mortgage money and costs, and the claims of all others who had prior legal or equitable liens or interests in the mortgaged premises. But if his judgment was recovered after the property was struck off to the purchaser, by the master, he never had any legal or equitable lien upon this fund or upon the premises which produced it; and being a mere creditor at large of Jacocks, he would have no right to interfere in this controversy until he had exhausted his remedy at law against Jacocks: *Douglass v. Huston*, 6 Ham. (Ohio) 162. The conclusion at which I have arrived on other points in this case, however, renders it unnecessary for me to consider the question whether Cleveland has shown such a lien upon the fund as to authorize him to join with Jacocks in the appeal. It is also wholly immaterial to the rights of the respondents, for if they have no claims upon the fund, it is of no consequence whatever to them how it is disposed of as between Jacocks and his creditor. And if they have any equitable claims as against him, the law is now perfectly well settled that the legal liens of his judgment-creditors, whether the judgments were recovered before or after

the decree, can not in this court be permitted to prevail against the prior equitable claims of the respondents upon this specific fund: *White v. Carpenter*, 1 Paige, 217;¹ 1 Story Eq. 398, n. 1; *Arnold v. Patrick*, 6 Paige Ch. 310.

From the undisputed facts in this case, it appears that F. Jacocks had no pretense of claim on his own account to any part of the real or personal estate of Cornell. Even if he had been the husband of Mrs. Montfort, instead of holding towards her the relation which he did, the whole of her share of the property would have belonged to her children exclusively, as she died in the life-time of her father. And the evidence clearly shows that Jacocks made the claim to the property and assumed to act as the voluntary guardian or protector of the rights of the infant children in resisting the claims of the two adult children to the whole, and in making the compromise by which eight tenths of the share was conveyed to him. No one who adverts to the circumstances under which the conveyance to him was made, can believe that he could have obtained the same except in his assumed character of protector of the rights of the infant children, and under a belief on the part of the grantors that their natural brothers and sisters were to have a beneficial interest in the property thus conveyed. Although Mrs. Montfort was living in adultery with Jacocks at the time of the birth of the eight younger children, it does not appear that the real husband did not have access to her, so that he might have been the father. Upon the maxim, *pater est quem nuptia demonstrat*, therefore, this claim to part of the property in behalf of the infants was not entirely without foundation. And the person who has assumed to act for them, and who has actually obtained the property under a conveyance intended for their benefit, can not now be permitted to insist that they had no interest in that property and that he holds it discharged of the trust.

It may even be admitted for the purpose of deciding this controversy, and the other joint owners have acted upon such presumption in the subsequent partition of the estate, that the whole legal title to the one fifth was in the two eldest children previous to their conveyance, but that they voluntarily relinquished a portion of their legal rights to Jacocks for the benefit of these younger children of their mother, to settle a family dispute the litigation of which must necessarily bring disgrace upon her memory. Even then I am not aware of any principle of law or equity, and certainly there is nothing in the code of

1. 2 Paige, 217.

good morals, which could authorize the paramour, under such circumstances, to claim the whole benefit of this conveyance, which was not intended for his use but for the use of the infant offspring of his guilt and infamy. It is a settled principle of equity that where a person undertakes to act as an agent for another he can not be permitted to deal in the matter of that agency upon his own account and for his own benefit. And if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal: *Parkist v. Alexander*, 1 Johns. Ch. 394; *Lees v. Nuttall*, Taml. 282; S. C., 2 Myl. & K. 819. More especially, in a case where he assumes to act as the agent and protector of the rights of infants, and in that character obtains a conveyance in his own name which was intended for their benefit, will he be considered as holding the legal title in trust for them. In this case, therefore, Jacocks took the property in the character of trustee for the eight minors in whose behalf he made the claim. And he has no equitable right to the rents and profits or proceeds of any part of the property, except his claim for the sums actually expended by him in securing the title, and such sums as he may have expended for the support of the respondents respectively beyond the value of their services.

The only error of the vice-chancellor, therefore, was in making a decretal order which was too favorable to the appellants, by giving to Jacocks the benefit of a life estate in the property to which he was not entitled. But as the surplus proceeds of the mortgaged premises are the only matters now in controversy, the taking of this account being for the sole purpose of ascertaining the right to this fund and apportioning it properly among the respondents, according to the amounts which are due to them respectively from Jacocks, which amounts are now an equitable lien on this only remaining fund, the respondents will not probably be eventually prejudiced by the error of permitting him to have the benefit of a life estate in the property conveyed to him by the two elder children. There is certainly nothing in the decretal order of the vice-chancellor of which these appellants had any right to complain.

As the fund was in court, and Jacocks elected to proceed on a reference to a master, under the rule, for the purpose of settling the rights of the several claimants to the surplus, it does not lie with him to object that this was not a proper mode of settling the controversy between him and the respondents, and that there should have been a more formal proceeding by bill,

in which all other matters in controversy might have been finally disposed of between the parties. A claim having been made upon the fund in court, neither party could be permitted to take it out, without giving security to refund, until the right to the same was settled in some manner. And if he was not willing to have the rights of the respective parties ascertained in this manner, he should, instead of asking for a reference, have himself filed a bill, or have asked to be permitted to take the fund out of court upon giving security to refund the same with interest and costs, if the other claimants should succeed in establishing an equitable right to the same. And Cleveland, who was not a party to the suit, certainly stands in no better situation than the other claimants in this respect, as he comes in under the order of reference merely. In this stage of the proceedings none of the parties were in a situation to make any such objection, even if it would have been valid at an earlier period of the investigation. But there is, in fact, no ground whatever for the objection. This summary mode of adjusting conflicting claims to the surplus proceeds of mortgaged premises was adopted for the purpose of saving the costs of a multiplicity of suits, and of useless litigation. And where the fund is in court or in the hands of its officers, it is a matter of discretion merely whether the court will direct a bill to be filed to ascertain the rights of different claimants, or refer it to a master and authorize them to litigate their claims before him, with the privilege of an appeal to the court itself, if any of the parties are dissatisfied with his decision.

The decretal order appealed from is affirmed with costs.

JUDGMENT LIEN attaches to the actual rather than to the apparent interest of the defendant, and is subject to all pre-existing equities: *Matter of Howe*, 19 Am. Dec. 395 and note; *Sandford v. McLean*, 23 Id. 773; *Coombs v. Jordan*, 22 Id. 236; *Morris v. Mowatt*, Id. 661.

Principal case has been cited with approval in support of the following propositions: A judgment before a foreclosure sale is a lien on the surplus proceeds, while a judgment after such sale is not: *Denham v. Cornell*, 67 N. Y. 562. To entitle one to adopt and enforce a trust, he need not have any right or title to the property other than that which springs out of the transaction itself: *Garvey v. Jarvis*, 46 Id. 317. A trustee must pay to the *cestui que trust* all moneys received on their account: *Taylor v. Benham*, 5 How. (U. S.) 274. A trust or a lien follows and controls the proceeds of the property: *Seymour v. Freer*, 8 Wall. 214; *Gibson v. Warren*, 14 Id. 250; *Olcutt v. Bynum*, 17 Id. 63. One will not be permitted to purchase property in contravention to his duty, and if he does so, will, in equity, be treated as trustee for his principal or *cestui que trust*: *Voorhees v. Presbyterian Church*, 8 Barb. 142; S. C., 5 How. Pr. 65. An agent professing to compromise a claim on behalf of his principal can not take the fruits of the negotiation to his own use: *Sterrick v. Dickinson*, 9 Barb. 520; *Corse v. Leggett*, 25 Id. 395.

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VAN DUZER v. VAN DUZER ET AL.

[6 PAGE OR. 360.]

WIFE HAVING EQUITABLE RIGHTS AGAINST HER HUSBAND is entitled to protection from judgment liens against him.

HUSBAND BY MARRIAGE ACQUIRES an immediate and vested interest in wife's realty for their joint lives.

WIFE CAN NOT IN EQUITY ENJOIN SALE of husband's life interest in her realty, unless he has forfeited his right thereto by such a breach of the marital contract as entitles her to a decree of separation.

BILL, by wife against husband and his judgment creditors, to enjoin sale of husband's estate as tenant by curtesy initiate, in the lands of his wife. It was shown that the husband was insolvent and improvident, and wholly failed to provide for the wife and children.

M. T. Reynolds, for the complainant.

I. R. Van Duzer and H. G. Wisner, for the defendants.

WALWORTH, Chancellor. . The answer fully denies all the allegations in the bill impeaching the consideration of the judgment. Although the judgment creditors admit they had occasionally gambled with the husband of the complainant, and that it is impossible for them to say whether they have won more money from him than he has from them, yet they both explicitly swear, in their answer, that not one cent of the moneys for which the judgment was obtained was won at gaming, or grew out of any gaming transactions. Neither do I think it competent for the wife, in such a case as this, to impeach the consideration of a judgment recovered against the husband, unless she can also satisfy the court that the judgment is the result of collusion, or of a conspiracy between her husband and mere nominal creditors to deprive her and her children of an equitable right to a provision for support out of her property. There is no doubt, however, as to the fact that the husband has ruined himself by gambling; and that if his interest as tenant by the curtesy initiate in his wife's real estate is sold on the execution upon this judgment, his wife and her infant children will be left without any means of support during his life. The only question to be decided, therefore, upon the present application, is, whether this court has any power to reach this life interest so as to preserve it for her support; and thus to protect her and her helpless children against a vicious and improvident husband and his creditors.

If the wife has any equitable rights as against the husband himself, she is equally entitled to protection as against the lien of a judgment; which can not in this court be permitted to overreach a prior equitable claim upon the land, although at law it is a lien upon the legal estate of the husband. Had the husband, therefore, before the recovery of the judgments, been guilty of any act which entitled the wife to a decree for a divorce or a separation, and for a support for herself and children out of his estate, and had this bill been filed for that purpose also, I should have found no difficulty in giving effect to that prior equity against the general lien of the judgments, as well as against the acts of the husband himself. In such cases this court considers the husband as having, by his misconduct and criminality, forfeited all equitable right to the wife's property which he acquired by virtue of the marriage, whether the same be in possession or in action. And upon the ground that she is in equity entitled to a restoration of the property which he has forfeited by a willful breach of the marriage contract, the court may, upon a dissolution or permanent suspension of the marriage contract, restore to the injured wife the whole of her property which has not already passed into the hands of *bona fide* purchasers. Upon the ground also that her equitable claim relates back to the time of the commission of the offense which entitled her to a divorce or a suspension of the marital rights of the husband, the court may not only protect that equity against the husband himself, but also against all others except *bona fide* purchasers, or those who have obtained a specific lien upon the property without notice of her equitable rights, and that she intended to enforce them by a bill for a separation. And a judgment creditor who has only a general lien, and which accrued subsequently to the husband's forfeiture of his marital rights, is not entitled to enforce it against this prior equity of the wife.

It was upon this principle, as I understand the facts in the case, that the late Chancellor Kent decreed a perpetual injunction against the creditors of the husband, in *Haviland v. Myers and Bloom*, 6 Johns. Ch. 25, 178. It is true the language of the court in that case would seem to imply that the learned chancellor intended to decide that the general equity of the wife to a support out of marital property originally hers, extended to such property which the husband had already reduced to possession, as well as to that which lay in action only; so as to authorize her to file a bill to protect the property actually in

the possession of an improvident husband against him and his creditors. But from the reference to that case in his commentaries it is evident that the language used in the reported decision on that subject was only intended to be applied to the wife's property in action, so far as the question of her general equity merely is concerned: 2 Kent Com., 2d ed. 141. There is another class of cases, however, and the case of *Udall v. Kenney*,¹ 3 Cow. 590, belongs to that class, where this court may interfere in behalf of the wife or her children, and take from the husband not only the property in action, which he has acquired by the marriage, but also that which he has reduced to possession, for the purpose of securing a suitable provision for the wife herself, and also for the issue of the marriage. But these are cases where the husband has married a ward in chancery, without the consent of those who by law are intrusted with the protection of her property and her rights. In such cases as the husband is guilty of a contempt, and as the whole property of the infant *feme-covert* is under the special protection of the court, the court itself, even without the consent of the wife, may, upon the application of any of her friends in her behalf, restrain the husband and his creditors from intermeddling with her estate until a proper settlement is made for the benefit of the wife and the issue of the marriage.

How far this court is authorized to interfere for the protection of the wife's equity in the marital property, not under the protection of this court, which the husband has not reduced to possession, does not appear to be fully settled. There appears to be no doubt, however, as to the power of the court to protect her equity in such property when the husband or his assignee is obliged to resort to this court for relief: *Howard v. Moffat*, 2 Johns. Ch. 206. The decisions, however, still leave the question in doubt how far this court can interfere, upon the application of the wife, to protect that species of property against the improvidence of the husband, where either he or his creditors can reach it without the aid of a court of equity; though Chancellor Kent, as I think correctly, supposes that the court may interpose to protect the wife's right to a legacy or portion by will or inheritance, notwithstanding the husband has a remedy at law for the recovery thereof. And he says: "Perhaps chancery ought, on just principles, to restrain the husband from availing himself of any means, either at law or in equity, of possessing himself of his wife's personal property in action,

1. *Udell v. Kenney*.

unless he would make a provision for her:" 2 Kent Com. 139, 141; 4 Paige, 64.¹

In the case under consideration, however, with the strongest desire to protect, if possible, this unfortunate wife and her helpless children, who are about to be reduced to beggary in consequence of the improper conduct of an improvident and gambling husband and father, aided and encouraged perhaps in his vicious courses by those who are now about to take from the wife and children their only means of support, I have not been able to find any principle either of law or of equity which can authorize this court to interfere with the husband's legal estate, as tenant by the curtesy initiate in his wife's real property, so as to place it beyond his reach and the reach of his creditors. The general rule of law is well settled, that by the marriage the husband takes an immediate vested interest in his wife's freehold estate for their joint lives, at least, and an absolute right to all her personal property in possession, unless the same is in the hands of a trustee, or is protected by an antenuptial contract.

The case of *Thomas v. Sheppard*, before the court of appeals of South Carolina, 2 McCord Ch. 36 [16 Am. Dec. 632], is a direct decision upon the question now under consideration; and after a careful examination, I have not been able to find that any judicial tribunal has adopted or sanctioned a principle of equity which would necessarily lead to a different conclusion. The opinion of the learned commentator upon American law, who has carried the doctrines of the wife's equity as far as it had ever been supposed to extend by any judge who has preceded him, evidently is that it does not extend so far as to authorize a court of equity to seize upon property which formerly belonged to the wife, but in which the husband has, without fraud, obtained a vested legal interest in possession by virtue of his marital rights; unless he has forfeited his right by a breach of the marriage contract, so as to entitle the wife to a decree of separation. And as the whole doctrine of the wife's general equity depends upon a course of judicial precedents, I do not feel myself authorized to go beyond this plainly-marked boundary, in a case where there is no pretense that the husband has been guilty of any act for which the wife intends to seek a dissolution of the marriage, or a judicial separation.

The injunction must therefore be dissolved.

WIFE IS PROTECTED in some cases against the hardship of the common

1. *Van Epps v. Van Dusen*; S. C., 25 Am. Dec. 516.

law rule merging her legal identity in that of her husband. Thus, where husband and wife sue for a legacy bequeathed her, the court may make a suitable provision for her out of it, before decreeing its payment to the husband: *Glen v. Fisher*, 10 Am. Dec. 310; and generally equity will not aid a husband to obtain possession of his wife's fortune, without requiring him to make adequate provision for her, or to show that such provision is unnecessary: *Helms v. Franciscus*, 20 Id. 402; *Duvall v. Farmers' Bank*, 23 Id. 558.

Upon the following points the principal case has been cited with approval: The legal estate of a husband as tenant by curtesy *initiate* in his wife's property, is subject to execution, and equity will not enjoin its sale: *Matter of Winae*, 1 Lans. 514; *Wickes v. Clarke*, 8 Paige Ch. 172. Lien of judgment is divested by subsequent sale under prior decree, so far as to be removed from the land sold, and attached to surplus proceeds of sale: *Ellsworth v. Cook*, Id. 645. When husband has forfeited his right to wife's property by his violation of marriage contract, it is just that she should retain such property: *Renwick v. Renwick*, 10 Id. 425. General liens of judgment creditors of husband in the lands of *feme-covert* are subject to her paramount right to the immediate use of the land upon her establishing her right to a divorce: *Sackett v. Giles*, 3 Barb. Ch. 205; *Holmes v. Holmes*, 4 Id. 297.

EDDY v. TRAVER ET AL.

[6 PAIGE CH. 521.]

SURETIES, OR PERSONS STANDING IN THE RELATION OF SURETIES, are entitled to be subrogated to the rights and liens of creditors whose debts they have discharged.

CREDITOR HAVING RIGHT TO RESORT TO TWO FUNDS, and electing to resort to that which, in equity, is only secondarily liable, another person having a claim on such secondary fund, is treated as a surety, and is entitled to take the place of the creditor with respect to the primary fund.

PURCHASER WITH WARRANTY FROM AN HEIR of realty, which is afterwards sold by order of the surrogate to pay the debts of the ancestor, is entitled to be subrogated to the rights of the creditors who are paid by such sale, and has an equitable lien on the rest of the estate remaining in the hands of the heir.

WHEN AN HEIR HAS ALIENATED PART OF THE ESTATE which has descended to him, and it becomes necessary to sell some part to pay the debts of the ancestor, the surrogate may order the unalienated part to be first sold.

BILL for partition of real estate, filed by two heirs at law of G. Eddy, who died prior to 1829, leaving four heirs. Sally, one of the heirs, and her husband, A. Traver, joined in a warranty deed, in April, 1829, of part of the lands to J. and G. W. Ross; but this deed did not embrace any of the lands now in controversy. Subsequently to this conveyance part of the lands thus conveyed were sold under order of the surrogate to pay claims against the intestate. By this Ross lost the title to part

of his lands, and he now claimed to be remunerated out of the interest of Traver and wife in the other lands of the intestate, which were being partitioned, with interest from the time of the surrogate's order of sale. The master disallowed the claim of Ross. He excepted to the disallowance.

W. Silliman, for Ross.

M. Hoffman, for Traver and wife.

WALWORTH, Chancellor. Upon the facts disclosed in the master's report, I think that the defendant Ross has an equitable lien upon the undivided interest of Traver and wife in the premises of which partition is sought in this case, to the extent of one fourth of the proceeds of the lands in which he had purchased their share, and which were sold under the surrogate's order; and also for the interest on that amount from the time of the confirmation of the sale by the surrogate. It is an established principle of equity that sureties, or those who stand in the situation of sureties for those who pay a debt for them, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien, or equity which he may have against any other person or property on account of the debt. And where the creditor has two funds to which he may resort for the satisfaction of his debt, if he resorts to that which in equity is only secondarily liable, to the injury of one who has a claim upon the secondary fund only, or resorts to a fund belonging to a third person, which fund is only secondarily liable for the payment of the debt, the person who is the owner of, or has a claim upon the fund thus taken, is considered as a surety merely, and is entitled to stand in the place of the creditor as against the primary fund: 1 Strong Eq. 477, sec. 499; Id. 588, sec. 633, etc. It was upon this equitable principle that this court proceeded in the case of *Clowes v. Dickinson*,¹ 5 Johns. Ch. 235, in charging the payment of a judgment upon lands which had been aliened by the judgment debtor, in the inverse order of their alienation—the first purchaser in such a case standing in the situation of a mere surety for the payment of the judgment debt. In cases depending upon this equitable principle, as between the debtor and his sureties, it makes no difference, except as against *bona fide* purchasers or mortgagees, that the debt has been actually paid by the sureties, or out of their property; so that the creditors' lien upon the property of the principal debtor is extinguished at law. Thus,

1. *Clowes v. Dickinson*.

in the case of *Watts v. Kinney*, 3 Leigh, 272 [23 Am. Dec. 266], where the sureties had actually paid the debt, so that the lien of the creditor's judgment was discharged at law, the court of appeals in Virginia decided that the sureties were in equity entitled to the benefit of the judgment, as a lien upon the land, as against the claims of an attaching creditor: See also *Cuyler v. Ensworth*, 6 Paige, 32; *Burrows v. Wham*,¹ 1 Desau. 409; *Sprigg v. Braman*, 6 La. 206.²

Applying these equitable principles to the case under consideration, there is no doubt of the right of Ross to be substituted in the place of the creditors of the intestate who have been paid their debts by a sale of that part of the property which had been conveyed by Traver and wife, instead of charging such debts upon the property which still remained unsold. If the creditors had brought their suit against the heirs for the payment of the debts of the ancestor, the real estate which remained in the hands of Traver and wife unsold must have been applied for that purpose; and that which had been previously sold and conveyed to Ross would have been discharged. I am inclined to think the surrogate had the power to direct the sale to be made in such a manner as to protect the equitable rights of the purchasers from the heirs at law. But whether he had such power or not, this court has jurisdiction and authority to protect all the equities of one who was standing in the situation of a mere surety for Traver and wife, so far as the debts of the ancestor remained a lien upon the lands which they had sold to him. And neither the want of such power in the surrogate, nor the neglect to exercise it if the power in fact existed, can in this case deprive the defendant Ross of his equitable claim to be substituted in the place of the creditors of the intestate as to the lien which they had, before the sale under the surrogate's order, upon the lands of Traver and wife held by them in right of such wife as one of the heirs at law to whom such lands had descended, charged with the payment of such debts.

The exception to the master's report was, therefore, well taken. The amount of the proceeds of the sale of Ross' interest in the lands sold under the surrogate's order, together with the interest thereon and his costs, must be paid out of the fund set apart by the decree for that purpose; and the residue of that fund must be distributed according to the principles of the decree.

1. *Burrows v. McWhann*.

2. *Sprigg v. Braman*, 6 La. 59.

SUBROGATION OF SURETY to rights and remedies of the creditor: See *Hayes v. Ward*, 8 Am. Dec. 554; *King v. Baldwin*, Id. 415; *Creagher v. Brengle*, 9 Id. 516; *Sandford v. McLean*, 23 Id. 773; *Bank of Montpelier v. Dixon*, 24 Id. 640. A surety, after paying the debt, is, in equity, entitled to reach and appropriate any fund set apart by the principal debtor for the payment of the debt: *Rodes v. Orockett*, 24 Id. 489.

Cited, to show that surety is entitled to be subrogated to the rights of the creditor, in *Marsh v. Pike*, 1 Sandf. Ch. 213; *Elwood v. Diefendorf*, 5 Barb. 413; *Goodyear v. Watson*, 14 Id. 486; *Bank of Toronto v. Hunter*, 20 How. Pr. 298; 4 Bosw. 648; *Martin v. Wagener*, 60 Barb. 446; that a creditor ought first to resort to a primary fund, where there are two, so as to relieve his surety as far as possible, in *Wheelwright v. Depuyster*, 4 Edw. Ch. 244; that an alienee may be subrogated to the rights of a creditor, in *Wilkes v. Harper*, 3 Sandf. Ch. 11; *Loomer v. Wheelwright*, Id. 161.

CHAPMAN v. ROBERTSON ET AL.

[6 PAIGE CH. 627.]

SET-OFF FOR MONEY ADVANCED is available in chancery as against a bond and mortgage on which suit is brought, and a cross-bill is not necessary for its assertion.

CONSTRUCTION AND VALIDITY OF PERSONAL CONTRACTS depend on the laws of the place where they were made, unless they were entered into with the view of being performed elsewhere.

TRANSFER OF LANDS OR OTHER HERITABLE PROPERTY, and the creation of liens thereon, is governed by the laws of the place where such property is situate.

LEX LOCI REI SITÆ also determines whether the property is to be considered as real or heritable.

PLACE OF PAYMENT IS PRESUMED to be where obligee resides or is found.

MORTGAGE VALID BY THE LAWS OF THE PLACE where the lands are situated, and where it was executed, can not be avoided because it conflicts with the usury law of the country where the mortgagee resides, and where the money is payable.

A CREDITOR, UPON A LOAN OF MONEY MADE HERE, may stipulate for the highest rate of interest permitted by our laws, though such rate is higher than that sanctioned by the law of the place where payment is to be made.

BILL to foreclose mortgage given to Chapman by Robertson on lands in state of New York. Robertson, a resident of New York, being in England, applied to complainant for a loan. It was thereupon arranged that on Robertson's return to New York he should execute a bond and mortgage, and have them recorded, and then transmitted to complainant in England, and the latter, on receiving the securities, was to deposit the amount of the loan with the mortgagor's bankers in London. The arrangement was afterwards fully consummated. The defend-

ant Robertson claimed an offset for ninety dollars and seventy-three cents, advanced to the mortgagee's son at request. He also pleaded the usury laws of England.

K. Miller, for the complainant.

A. L. Jordan, for the defendant.

WALWORTH, Chancellor. The bank, which is a judgment creditor of the mortgagor, having suffered the bill to be taken as confessed, the only questions in controversy in this cause arise out of the facts set up in the answers of Robertson as matters of defense. The offset claimed by Robertson must be allowed; as he alleges in his answer that it was money advanced to a son of the complainant, and at his request. The revised statutes expressly provide that in suits for the payment or recovery of money, set-offs shall be allowed in this court in the same manner and with the like effect as in actions at law: 2 R. S. 174, sec. 40. And this is a suit for the recovery of money, to wit, the interest money due on the bond and mortgage. The defendant Robertson therefore having a just demand against the complainant for the money advanced at his request, and which would at law be a proper subject of offset in a suit upon the bond, he has a right, under this provision of the revised statutes, to set off the amount thus due to himself against the interest which he owes to the complainant upon the bond and mortgage, which the latter is seeking to recover, or to obtain the payment of by the present suit in this court.

I am aware that in the case of *Troup v. Haight*, Hopk. 270, Chancellor Sanford intimated an opinion that a cross-bill might be necessary to enable a defendant to avail himself of a set-off in a suit in this court. This, however, was before the adoption of the revised statutes, which put the set-off in this court and at law upon the same footing. And I can see no necessity for a double litigation by cross suits, in such a case, in one court more than in the other. The set-off may be litigated and determined upon a general replication to the defendant's answer in this court, as well as upon a notice annexed to the plea of the defendant in a suit at law. The statement of the set-off in the answer is a substitute for the notice annexed to the plea. And, upon the general replication to the answer, the complainant may introduce any evidence which is relevant and proper for the purpose of showing that the demand claimed as a set-off is not legally or equitably due, or that for any other reason it should not be allowed. The defendant, on the other hand, may

introduce proofs to rebut any special defense to his claim of offset which the complainant may attempt to establish. This court has already decided that a debt due from the mortgagee to the mortgagor may be offset against the amount due from the latter on the mortgage. And it may be done even where the mortgage has been assigned, if the right of set-off existed at the time of the assignment: *Rosevell v. The Bank of Niagara*, Hopk. 579. The defendant in the present case is, therefore, entitled to the set-off claimed in his answer; and a cross bill is not necessary to enable the court to give him the full benefit thereof upon this bill of foreclosure.

The other point in this case presents a very nice question arising out of the conflict of laws in this state and England, relative to the legal rate of interest. It is an established principle that the construction and validity of contracts which are purely personal depend upon the laws of the place where the contract is made; unless it was made in reference to the laws of some other place or country where such contract, in the contemplation of the parties thereto, was to be carried into effect or performed: 2 Kent Com. 457; Story Conf. L. 227, sec. 272. On the other hand, it appears to be equally well settled by the laws of every state or country, that the transfer of lands or other heritable property, or the creation of any interest in, or lien or incumbrance thereon, must be made according to the *lex situs* or the local law of the place where the property is situated. And it has been decided that the *lex loci rei sitæ* must also be resorted to for the purpose of determining what is or is not to be considered as real or heritable property, so as to have locality within the intent and meaning of this latter principle: *Newlands v. Chalmer's Trustees*, 11 Shaw & D. Sess. Cas. 65.

The case under consideration would have come clearly within the first of these principles, if the bond of Robertson had been the only security for this loan; although he resided in this state and intended to use the money here, where the legal rate of interest is seven per cent. as specified in the bond. There is nothing in the bond from which it can be inferred that the parties contemplated the payment of the money in this state. And as no place of payment is mentioned, the legal construction of the contract is that the money is to be paid where the obligee resides or wherever he may be found. His residence being in England at the execution of the bond, that must therefore be considered the place of payment, for the purpose of determining the question where that part of the contract is to be per-

formed. I lay out of view the fact that the bond itself was signed and sealed in this country, because as a mere personal contract it would be wholly inoperative until it was received by the complainant in England, where the money was then to be deposited with the banker for the use of the borrower. To this extent the decision of the court of king's bench in the case of *Dewar v. Span*, 3 T. R. 425, is unquestionably a correct exposition of the law of England and also of this state. For, as I understand that case, the bond which was the subject of litigation had no other connection with the West India estate than that the consideration of the original bond was a part of the purchase money upon the sale of an estate at St. Christopher's; which estate had been sold and conveyed many years previous to the execution of the bond in question. And it does not appear from the report of the case that the debt for which the bond was given was in any way chargeable upon the land at that time. From the plea which the defendant put in, and which must have been sustained by the proof on the trial, it is evident that the last bond, upon which that suit was brought, was given for the purpose of obtaining a further extension of credit upon a debt which was then due upon personal security in England, where all the parties to the last bond resided. It was therefore a new and distinct contract for the forbearance of a debt upon personal security merely; although the original consideration for that debt was the estate sold in the West Indies more than forty years previous to that time. There was no question of conflict of laws in the case; but merely whether the bond was a security respecting lands in the West Indies within the intent and meaning of the English statute on that subject. And the court very properly held that the statute did not extend to contracts merely personal, and not connected with the security upon the land. That case, therefore, leaves the question untouched whether, independent of that statute, a mortgage executed in England upon a West India estate would have been valid if interest had been reserved according to the *lex rei sitæ*.

I am aware that in *Stapleton v. Conway*, 3 Atk. 727, an opinion was expressed by Lord Hardwicke that a mortgage upon land in the colonies, if executed in England and connected with a bond or other personal covenant for the payment of more than five per cent. interest, was usurious and void. And there are other *dicta* to be found in some of the cases which occurred previous to the statute 4 Geo. III., c. 79, which are supposed to recognize the same principle. The question, however, does

not appear to have been definitely settled until the passage of that act, which was intended to remove all doubts upon the subject; and which applied to contracts theretofore made as well as to securities which should be executed subsequent to the passing of the act. Doubts might well exist as to the validity of loans made in England, upon such securities, where both parties resided there; especially if the money was not loaned for the purpose of being used in the colony where the mortgaged premises were situate, as the giving of such a security might be a very convenient mode of evading the statute of usury. No doubt, however, appears to have been entertained as to the validity of a loan upon a bond and mortgage actually executed in Ireland or the colonies, although the loan itself was made in England and was made payable there or to a mortgagee who resided there. For that reason I presume the statute merely puts the bond and mortgage executed in England upon the same footing, as to validity, as if they had been executed in the colony; and without any reference to the place where the money loaned was received or intended to be used, or was by the agreement of the parties to be repaid. I have very little doubt, therefore, that a security like that which is now under consideration, actually executed in the country where the mortgaged premises was situate, by a person domiciled at that place, for the repayment of a loan to be made upon the faith of such foreign securities, and for the purpose of being used by the borrower in the country of his residence, would have been considered as valid by the courts of England even if this statute had not been passed. And if this was a valid mortgage by the laws of England, so that a recovery might have been had in that country upon the covenant for the repayment of the money, or upon the bond given therewith as collateral security, it is unquestionably a valid security here to give a lien upon the mortgaged premises for the payment of a rate of interest authorized by the *lex situs*.

The distinguished author of the recent learned and invaluable commentary on the conflict of laws appears to lean to the opinion, that the mere taking of a security upon lands in another state or country, on a loan at a higher rate of interest than is allowed by the laws of the place where such loan is made and the security given, will not so change the locality of the contract as to protect it from the operation of the usury law of the place where such loan is made, unless there is a further agreement, either express or implied, that the money shall be repaid

at a place where the rate of interest reserved upon the loan is allowed by law: Story Conf. L. 238, sec. 287. But neither he nor Chancellor Kent appears to have expressed any opinion upon the precise question presented in the present case, in which the rate of interest reserved is allowed by the law of the place where the mortgaged premises are situated, and where the bond and mortgage were actually executed, but is more than could be legally reserved by the law of the place where the money was received, and where by the legal construction of the contract it must be deemed to be payable. Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclusion that this mortgage executed here, and upon property in this state, being valid by the *lex situs*, which is also the law of the domicile of the mortgagor, it is the duty of this court to give full effect to the security; without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon the lands here.

If no rate of interest was specified in the contract it might perhaps be necessary to inquire where the money was legally payable when it became due, for the purpose of ascertaining what interest the mortgagee was entitled to receive: *Quince v. Callender*, 1 Desau. 160; *Scofield and Taylor v. Day*, 20 Johns. 102. But if a contract for the loan of money is made here, and upon a mortgage of lands in this state which would be valid if the money was payable to the creditor here, it can not be a violation of the English usury laws; although the money is made payable to the creditor in that country and at a rate of interest which is greater than is allowed by the laws of England. This question was very fully and ably examined by Judge Martin in the case of *Depeau v. Humphreys*,¹ in the supreme court of Louisiana, 20 Mart. 1; and that court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken, upon a loan, by the laws of the state where such note was made payable. Here the verbal contract for a loan, upon the security of a mortgage upon lands in this state, was

1. *Depeau v. Humphreys*, 8 Mart. (N. S.) 1.

wholly inoperative until the mortgage and other written security were executed in this state, and which agreement was consummated by the deposit of the money to the order of the borrower. It was a contract partly made in this state and partly in England. And being actually made in reference to our laws, and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity. An appeal to the courts of this state was also contemplated by the parties, if necessary, to enforce a performance of the written agreement for the repayment of the loan; although from the residence of the mortgagee in England it might be necessary to send the money there to make a legal tender of the debt. And the complainant, upon this foreclosure of his mortgage here, is only entitled to recover the amount loaned with seven per cent. interest thereon, payable to him, or his solicitor here, and is not entitled to any allowance for the difference in exchange between the two countries: See 20 Johns. 102.

The usual decree for a foreclosure and sale must therefore be entered. And the interest must be computed by the register and inserted in the decree, except the interest for the first year which is paid; the set-off being allowed in part payment of the first year's interest.

LAW OF THE PLACE WHERE CONTRACT IS ENTERED INTO, when controls: *King v. Harman's Heirs*, 26 Am. Dec. 485; *Malpica v. McKown*, 20 Id. 279; *Arayo v. Currell*, 20 Id. 286 and note; *Miles v. Oden*, 19 Id. 177; *Barrera v. Alpuente*, 17 Id. 182; *Bradshaw v. Newman*, 12 Id. 149; *Lynch v. Postlethwaite*, Id. 495 and note; *Touro v. Cassin*, 9 Id. 680.

LAW OF THE PLACE WHERE PROPERTY IS SITUATE, when controls: *Broh v. Jenkins*, 13 Am. Dec. 320; *Ramsey v. Stevenson*, 12 Id. 468 and note.

The principal case is a leading one, and has been very frequently cited, especially by the courts of the state in which it was pronounced. Thus, it was relied upon to show that a set-off in favor of the mortgagor may be asserted against the mortgagee in a suit to foreclose the mortgage: *Holden v. Gilbert*, 7 Paige Ch. 211; *Irving v. De Kay*, 10 Id. 322; *Bathgate v. Haskin*, 59 N. Y. 537; provided the circumstances were such as to have made the set-off available at law. If, however, the defendant's demand were not due at the commencement of the suit, or were procured by assignment *pendente lite*, it could not be made available in equity, because not available at law: *Ransom's Adm'r v. Copeland*, 2 Sandf. Ch. 252; *Knapp v. Burnham*, 3 Id. 332. But the principal case has been usually cited upon questions regarding the conflict of laws, and where it was necessary to decide whether resort ought to be had to the law of the domicile of one or more of the parties, or the law of the place in which the contract was made, or the law of the place in which the property was situated. It has been approved upon the following propositions: A purely personal contract is held to be made with regard to the laws of the state in which it was entered into, and its construction and validity will be determined thereby: *Meade v. St. Louis M. L. I. Co.*, 51 How. Pr. 6; *Bard v. Poole*,

12 N. Y. 503; *King v. Sarria*, 69 Id. 32; *Curtis v. Leavitt*, 15 Id. 227. If the rate of interest is higher at the place of the contract than at the place of performance, the parties may lawfully contract for the higher rate: *Miller v. Tiffany*, 1 Wall. 310; *Arnold v. Potter*, 22 Iowa, 198; *Kilgore v. Dempsey*, 23 Ohio St. 419; *Scudder v. U. N. B.*, 91 U. S. 412; *Fisher v. Otis*, 3 Chand. 106. In such cases the interest may be stipulated for according to the law of either place: *Fitch v. Remer*, 1 Biss. 341; *Bowen v. Bradley*, 9 Abb. (N. S.) 407; *Hildreth v. Shepard*, 65 Barb. 271; *Bank of Georgia v. Lewin*, 45 Id. 343; *Babne v. Wombough*, 38 Id. 363. A contract, if no place of payment is designated, is payable to the obligee wherever he resides or may be found: *Pomeroy v. Ainsworth*, 22 Id. 127. If securities be made in New York based on realty there situate, but with intent to dispose of them in a foreign country, they are nevertheless New York contracts: *N. Y. Dry Dock v. Am. L. Ins. & T. Co.*, 3 Sandf. Ch. 267; *Fitch v. Remer*, 1 Biss. 342. Real property and contracts relating thereto are subject to the law of the *situs*: *Boyce v. City of St. Louis*, 18 How. Pr. 128; S. C., 29 Barb. 652. Therefore, the validity of a mortgage is to be decided under the laws of the state where the land lies, irrespective of the domicile of the parties: *McCraney v. Alden*, 46 Id. 275; *Smith v. Alvord*, 63 Id. 431.

The decision in the principal case has not been particularly objected to; but its reasoning upon some propositions has been questioned: *Cope v. Alden*, 37 How. Pr. 184; 53 Barb. 353; *Curtis v. Leavitt*, 15 N. Y. 88, 228. Thus it is said that "the decision itself seems well supported in point of principle; for the parties intended that the whole transaction should be in fact, as it was in form, a New York contract, governed by the laws thereof, and the payment of the debt was to be there made. It is easily reconcilable with other laws and principles, if viewed in this light; if viewed as the chancellor interpreted the case, it is, perhaps, irreconcilable with other cases and with general principles." Story Conf. L., sec. 293 c. Mr. Wharton, in sec. 410 of his treatise on the conflict of laws, undertakes to harmonize the conflicting "cases on the question, whether, when a mortgage is given as security for a loan, and the mortgage is in one state and the place of payment of the loan in another, the law of the former state or that of the latter is to prevail in the settlement of interest." He thinks that the true test is to ascertain whether the loan is primarily on the debtor's credit, and the mortgage a mere collateral security; or whether the money was "employed on the land for which the mortgage was given." "If the former be the case, then the law of the place where the money is due, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage is situate must prevail."

MILLS v. HOAG.

[7 PAIGE CH. 18.]

FINAL DECREE is one that disposes of the subject of litigation so far as the court is concerned.

DECREE IS NONE THE LESS FINAL because further proceedings before the master are requisite to carry it into effect.

VENDOR OF THE INTEREST OF ONE OF THE PARTIES is not entitled to prosecute an appeal, although he proceeds in the name of his vendor: a transfer of the right of appeal is against public policy.

COMPLAINANT'S ASSIGNEE can in no case proceed in the name of the original party, but must make himself a party by supplemental bill.

APPEAL IN THE NAME OF A PARTY who has previously assigned all his interest must be dismissed.

APPLICATION to dismiss an appeal.

A. Taber, for the appellant.

N. Hill, jun., for the respondent.

WALWORTH, Chancellor. The appeal in this cause, if regular, was brought in time. The decree was final, and not interlocutory, as it finally disposed of the subject of litigation so far as the court was concerned. Chief Justice Savage defines a final decree to be the last decree which is necessary to be entered to give to the parties the full and entire benefit of the judgment of the court. The decree in this case comes within that definition, as no further questions or directions are reserved for the future judgment of the court. And although some further proceedings are to be had before a master to carry into effect the decree, all the consequential directions depending upon the result of those proceedings are given in the present decree. It is true there may be exceptions to the master's report; and in that case a further order of the court will be necessary to dispose of those exceptions. But a decree is not the less final in its nature because some future orders of the court may possibly become necessary to carry such final decree into effect. The usual decree in mortgage cases, for the sale of the property and the distribution of the fund among the parties, and finally disposing of the question of costs, is a final decree as between the complainant and the defendants, and is constantly enrolled as such; although the master's report of the sale and distribution may be excepted to if it is erroneous, and it may require a subsequent order of the court to dispose of the questions which may thus arise.

There is no doubt, however, that the appeal bond is irregular; and the motion to dismiss the appeal should be granted, unless it is a case in which it would be proper to permit the appellant to amend, or to file a new bond properly executed and approved. The appeal itself is not in the usual form, as the notice is that the solicitor has appealed. This probably was a mere inadvertence in drawing the notice of the appeal; and as the same is signed by Goff as solicitor for the complainant, I shall consider it as the appeal of the complainant, by his solicitor, in deciding the other questions which arise upon this applica-

tion. From the affidavits before me, which the appellant has not attempted to contradict or explain, although he has had an opportunity to produce affidavits in opposition thereto, I must consider the fact as undeniable, that after the final decree of the vice-chancellor against the complainant as to the right to the farm which had formed the subject-matter of the litigation in this suit, he sold all his interest in the farm, and the right to review the decision on appeal, to other persons who were mere strangers to the suit; and that this appeal is now brought in the name of the vendor by them, and for their own use and benefit.

Upon this state of facts it is necessary, perhaps, to inquire whether the sale of the right to continue the litigation, under such circumstances, can be sustained upon the principles of public policy. In *Wilder v. Keeler*, 3 Paige, 166 [23 Am. Dec. 786], where a claim had been purchased under circumstances somewhat similar, I refused to relieve the purchaser, who was, as in this case, asking permission to litigate his claim to the subject purchased, as a matter of favor and not of strict right. And in *Prosser v. Edmonds*, 1 You. & C. 497, Lord Abinger says: "It is a rule, not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce." Applying that principle to the present case, I think the purchasers of this right to appeal from a final decree against the vendor, are not entitled to come here to ask the aid of the court, as a matter of favor merely, if they have made a slip by which their strict legal rights are at an end: *Cholmondeley v. Clinton*, 4 Bligh, 45, 90.

But even if purchases of this kind were both legal and meritorious, the right of appeal is gone and can not be restored by amendment, as the appeal is not in the name of the proper parties. In this court the proceedings must be carried on in the names of the real parties, so far, at least, as the rights of the complainant are concerned, although there has been a change of interest subsequent to the commencement of the suit. But the rights of the adverse party can not be prejudiced by any sale of the subject-matter of the suit, merely voluntary, *pendente lite*. Where the complainant sells his whole right in

the suit, or it becomes wholly vested in another by operation of law, whether before or after a decree, if there is to be any further litigation in the case, it can not be carried on, in the name of the original complainant, by the person who has acquired the right. And if the complainant's interest is determined by a voluntary assignment, the assignee must make himself a party to the suit, by an original bill in the nature of a supplemental bill, before he can be permitted to proceed: *Mittf. Pl. 65*; *Binks v. Binks*, 2 Bligh, 593. The complainant, therefore, was not the proper party to appeal after he had sold all his interest to others; and this court will not permit the appeal to be carried on in his name for their benefit.

The appeal must be dismissed with costs.

DECREE IS FINAL though future orders of court may be required to carry it into effect: *Stovall v. Banks*, 10 Wall. 587. "When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. It is true, a decree may be final, although it directs a reference to the master, if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court:" *Beebe v. Russell*, 19 How. (U. S.) 285; *Coit v. Crane*, 1 Barb. Ch. 23; *Wright v. Miller*, 3 Id. 387; *Brown v. Brown*, 31 How. Pr. 497; S. C., 4 Rob. 700; *Butler v. Lee*, 33 How. Pr. 260; S. C., 3 Keyes, 78; *Platt v. Stewart*, 47 How. Pr. 212; *Morris v. Morange*, 4 Abb. Pr. (N. S.) 450; S. C., 38 N. Y. 173; *Smith v. Lewis*, 1 Daly, 456. The principal case is cited as authority in all the foregoing. Other cases in this series, showing when a judgment or decree must be deemed final, are: *Commonwealth v. Baldwin*, 26 Am. Dec. 33; *Turner v. Plowden*, 23 Id. 596.

WELLS v. SMITH.

[7 PAIGE CH. 22.]

TIME IS AN ESSENTIAL PART OF A CONTRACT, when it appears from the contract that the parties so intended.

STIPULATION THAT IF A PARTY FAILED AT A TIME STATED, to perform all or any of his covenants, then that the agreements of the other party should cease and be void, is valid, and the failure to perform any of the covenants forfeits all interest of the party in default in the agreement.

VENDOR NEED NOT PREPARE AND TENDER DEED as condition precedent to forfeiture of contract of sale, for non-payment of purchase money. If the purchaser wishes to comply with his contract, he must offer to pay.

PERFORMANCE OF A CONDITION PRECEDENT, such as the payment of money at a time designated, may be made essential to the existence of the right to specific performance.

BILL for specific performance. Appeal from decree of vice-chancellor dismissing the bill.

S. P. Staples, for the appellant.

R. Bogardus, for the respondent.

WALWORTH, Chancellor. This bill is filed to compel a specific performance of a contract for the sale of a lot of land in New York, the complainant having failed to perform the contract on his part within the time stipulated. And the only questions are, whether upon an executory contract of sale, parties may make time an essential part of the contract, so that this court will not relieve against a non-compliance at the day; and whether it was the intention of the parties in this case to make the payment of the money on or before the time stipulated an essential part of the agreement.

There can not be a doubt that it was the intention of the parties in this case to make the time specified an essential part of the contract. It is hardly possible to make language more explicit. The contract was, that if the complainant failed or neglected to perform all or any one of the covenants therein contained on his part, at the time or times thereinbefore limited, then and in such case all the covenants and agreements on the part of the defendant should cease and be absolutely void; and all the complainant's right or interest in the premises either in law or equity should cease, etc. And one of the covenants on the part of the complainant was, to build and inclose a house upon the front of the lot on or before the first of August, or in lieu thereof, that he should on that day pay to the defendant one thousand dollars as the first payment towards the purchase money. The complainant had his election to do one or the other, as was most convenient for him; but if he did neither, it was unquestionably the intention of both parties that the defendant should be no longer bound by the contract. And although Mrs. Smith afterwards consented to modify the contract, so far as to permit him to pay the whole instead of a part only of the purchase money on the day—he not having attempted to build the house—she gave him fair notice that if he suffered the day to pass, without paying the amount stipulated in the contract, she should avail herself of the condition expressed in the agreement and refuse him the deed.

The vice-chancellor is right in supposing that the defendant was not bound to prepare and tender the deed until the complainant paid or offered to pay the money. If she wished to

compel a performance of the agreement and recover the money, in a suit at law upon the covenants, it might be necessary perhaps that she should have made a tender of the deed, and offered to deliver the same upon the payment of the one thousand dollars, and the delivery of a bond and mortgage for the residue of the purchase money. On the other hand, if the purchaser wished to comply with the contract so as to have the benefit thereof, he should have tendered the money at the day; or have offered to pay the same, and to execute the bond and mortgage for the residue, upon the delivery to him of a deed of the premises. And if he wished time to examine as to the validity of the vendor's title, he should have called for the abstract of title in season to enable his counsel to examine the title before the day upon which the money was to be paid, and the conveyances executed. But he had no right to call upon the defendant to make out the deed itself, or to furnish him with a draft thereof, previous to the time when the deed was by the terms of the agreement to be delivered.

As to the power of the vendor, or of the purchaser, to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, I have no doubt; though this court may perhaps relieve against a forfeiture where it would be unconscionable to insist upon a strict and literal compliance. Thus if a vendor, after he had received the greater portion of the purchase money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received, and the premises also, if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment, and convey the premises, or to restore the purchase money already paid; after deducting a reasonable allowance for the use of the premises in the mean time.

In this case, however, the interest of the money till the first of August, and the shop which the complainant agreed to leave on the premises if he did not perform his part of the contract at the day, are not probably more than the value of the use of the premises in the mean time and of the chance of gain to the purchaser by the probable increase in the value of the property. They may, therefore, very properly be considered as reasonable stipulated damages for the non-performance of the contract by the vendee at the time fixed upon by the parties, and are not properly a forfeiture. Although in theory the interest is sup-

posed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact, the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest can not compensate. On the other hand, it frequently happens that the perfecting of the title and the delivery of the possession of the premises at the time contemplated by the purchaser is of essential benefit to him; which can not be compensated by damages which are ascertainable by the ordinary rules of computing damages. It would therefore not only be unreasonable, but entirely unjust, for any court to hold that parties in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day.

Here there was no such impossibility as might not have been foreseen and provided against by proper care and vigilance. Under such circumstances, if the property had very much increased in value after the making of the original contract, the defendant is fairly entitled to the benefit thereof under the agreement by which the complainant contracted to relinquish all claims upon the property, either at law or in equity, if he did not comply with the terms of the agreement at the day. And as there is nothing inequitable or unconscientious in her insisting upon this part of the contract, I think the vice-chancellor was right in not making a new contract for her, contrary to the understanding of both parties when they entered into this agreement.

The decree appealed from is therefore affirmed, with costs.

ONE WHO IS BOUND TO CONVEY on the payment to him of the purchase price of lands is not required to demand such payment, and may stand on the defensive until it is tendered to him, and can not be deemed in default in the absence of such tender: *Ten Eick v. Simpson*, 1 Sandf. Ch. 250; *Cammeyer v. U. G. L. Church*, 2 Id. 243.

PERFORMANCE ON THE PART OF A VENDOR is not necessary where he does not sue for specific performance, nor to recover damages without rescinding the contract: *Morange v. Morris*, 34 How. Pr. 315. A vendee need not prepare and tender a deed. This duty devolves on the vendor: *Flynn v. McKeon*, 6 Duer, 207. The rights of a vendee may be made to depend upon the performance of a condition precedent specified in the contract; and when this is the case, equity will not relieve him from the consequence of his agreement: *People's Bank v. Mitchell*, 73 N. Y. 415; *Crippen v. Heermance*, 9 Paige

Ch. 214. When the time of payment is not an essential part of the contract, it may be made within a reasonable time after the day named: *McWilliams v. Long*, 19 How. Pr. 550; 32 Barb. 197. The principal case is relied upon as authority in all the foregoing.

Cases in this series showing whose duty it is to prepare and tender conveyance are: *Pinney v. Ashley*, 26 Am. Dec. 625 and note; *Blood v. Goodrich*, 24 Id. 121 and note; *Fuller v. Williams*, 17 Id. 498; *Fuller v. Hubbard*, 16 Id. 423; *Rector v. Purdy*, 13 Id. 494 and note.

FORFEITURE OF VENDEE'S RIGHTS.—It must be remembered that in the principal case, the equity of the vendee was by no means of a very persuasive or meritorious character. The default of which he had been guilty was in the performance of one of the very first and most material parts of his contract. He had not paid any part of the purchase price, nor had he done the act which the vendor was willing to accept in lieu of the purchase money. The language of the contract showed that time had been by the parties made an essential element; and that the acts to be done by the vendee were to be consummated by the time named, and that their consummation at that very time was a condition precedent, without which the vendee could gain and the vendor lose no rights.

Generally, if a contract be unilateral, as if it be that A. will convey, provided B. shall on a certain day pay a specified sum, time is deemed of the essence of the contract, and the payment of the sum is a condition precedent to the creation of any right in B. to the performance of the contract: 2 Lead. Cas. Eq. 1129, 4th Am. ed., citing *Kerr v. Purdy*, 51 N. Y. 629; *Maughlin v. Perry*, 35 Md. 352; *Jones v. Noble*, 3 Bush, 694; *Magoffin v. Holt*, 1 Duv. 95; *Brooke v. Garrod*, 3 Kay & J. 608; 2 De G. & J. 62; *Austin v. Tawney*, 2 L. R., Ch. App. 143; *Fissler's appeal*, 25 P. F. Smith, 483. In some instances, however, unilateral contracts have been adjudged to be proper subjects for specific performance, though not complied with at the time designated: *Jones v. Robbins*, 29 Me. 351; *Barnard v. Lee*, 97 Mass. 92; *Perkins v. Hasdell*, 50 Ill. 216; *Ewing v. Gordon*, 49 N. H. 444; *D'Anas v. Keyser*, 2 Casey, 249.

It would seem that the conflicting cases could be harmonized by establishing the rule that if the performance of an act, at a time stated, be made by the contract a condition precedent to the acquisition of any right thereunder, then that time is of the essence of the contract, and the obligee forfeits his rights by not performing at the time stated, and the forfeiture will not be relieved in equity. If, on the other hand, some right has already been acquired under the contract, as where part of the purchase price has been paid, or the purchaser has taken possession with the assent of the vendor, and made permanent and valuable improvements, any provision looking to the forfeiture of the contract will be treated as a condition subsequent, and relieved against, if its enforcement be shown to be inequitable: 2 Lead. Cas. Eq. 1134. This subject is thus treated in section 455 of Professor Pomeroy's recent treatise on equity jurisprudence: "Where an ordinary contract for the sale of land is so drawn that the vendee's estate, interest, and rights under it are liable to be forfeited and lost, upon his failure to pay the price at the time specified, the question whether equity will relieve him ought to be a very plain and simple one. But in the face of the authorities it is impossible to be answered in any general and certain manner. To examine this question in detail would require me to anticipate the full discussion of the doctrine concerning time as the essence of contracts in their specific enforcement. I shall, therefore, simply state the general conclusion derived

from the decided cases. It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity can not relieve a vendee who has made default. With respect to this rule, there is no doubt the only difficulty is in determining where time has thus been made essential. It is also equally certain that where the contract is made to depend upon a condition precedent, in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times, then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent. But where, on the other hand, the stipulation concerning payment is only a condition subsequent, a court of equity has power to relieve the defaulting vendee from the forfeiture caused by his breach of this condition, upon his paying the amount due with interest, because the clause of forfeiture may be regarded as simply a security for the payment. It is therefore held, in a great number of cases, that the forfeiture provided for by such a clause, on the failure of the purchaser to fulfill at the proper time, will be disregarded and set aside by a court of equity, unless such failure is intentional or willful. This conclusion is in plain accordance with the general doctrine of equity in relation to relief against forfeitures, but it can not be regarded as a universal rule. Under exactly these circumstances many American decisions have treated such a clause as rendering the stipulated time of payment essential, and as therefore binding according to its letter, and have refused to give any relief."

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

VAN RENSSELAER ET AL. v. CLARK.

[17 WENDELL, 25.]

SUBSEQUENT PURCHASER FOR VALUABLE CONSIDERATION.—These words, when used in a statute, mean a subsequent *bona fide* purchaser for valuable consideration.

PURCHASER WITH ACTUAL NOTICE OF A PRIOR DEED acquires title subject to such deed, though his deed be first recorded.

TWO CONVEYANCES FROM THE SAME GRANTOR being on record for the same land, all purchasers are chargeable with constructive notice of each deed from the time that it is filed for record. Therefore one who, after both deeds are recorded, acquires title under the second deed, though it be first recorded, is not protected from a prior deed, unless the grantee in the second deed had no actual notice of the first.

EJECTMENT. Derick Schuyler, on and prior to August 25, 1794, was the owner of the premises in controversy, being part of a military tract. On that day he conveyed them to James Van Rensselaer, father of plaintiffs, in consideration of fifty dollars, by a deed which was recorded January 2, 1804. Philip H. Schuyler, then having actual notice of the deed to Van Rensselaer, purchased the same land of Derick Schuyler, for one thousand dollars, on July 2, 1799, and on that day obtained a deed, which he caused to be recorded October 25, 1802. On April 2, 1805, and after both deeds were on record, Philip H. Schuyler, for one thousand three hundred dollars, conveyed to Samuel Clark, under whom, by various mesne conveyances, the lessor of the defendants claimed. The court charged the jury, that P. H. Schuyler was shown not to be a *bona fide* purchaser, and that the deed to him was therefore void; and that the

record of the deed to Van Rensselaer was sufficient notice to all who purchased after such record. Judgment for plaintiff. Defendant moved for a new trial, relying on his exception to the charge to the jury.

L. H. Palmer and S. Stevens, for the defendant.

J. A. Collier, contra.

By Court, COWEN, J. The question of knowledge in Philip H. Schuyler was put to the jury, who found for the plaintiffs, as they were directed to do by the judge, on being satisfied that he had actual notice of the prior deed. Their finding is fully sustained by the evidence.

The defendant moves for a new trial, on the ground that James Van Rensselaer's deed, not being deposited as required by the statute, was fraudulent and void as against P. H. Schuyler, though he had full notice. To this the answer is, the act applies only to such deeds as were dated prior to its passage, which was on the eighth of January, 1794. Van Rensselaer's deed was dated in August of that year. The statute of the eighth of January, 1794, after reciting that many frauds had been committed in respect to these bounty lands, by forging and antedating conveyances of lands to different persons, and various other contrivances, so that it had become difficult to discover the legal title; for remedy whereof, and in order to detect the said frauds and to prevent like frauds in future, enacted, by section 1, that all deeds, etc., theretofore made concerning such lands should, on or before the first of May, 1794, be deposited with the clerk of the city and county of Albany; and that those not so deposited should be adjudged fraudulent and void against the subsequent purchaser, etc., for valuable consideration; and that every deed, etc., thereafter to be made, etc., should be adjudged fraudulent and void as against any subsequent purchaser, etc., for valuable consideration, unless recorded by the clerk of Herkimer county, before the recording of the deed, etc., of the subsequent purchaser. Other counties were afterwards substituted as places of registry.

It is objected, that Schuyler's deed was first recorded. The answer given is, he had actual notice of Van Rensselaer's deed, which was held sufficient as to him in *Jackson ex dem. Gilbert v. Burgott*, 10 Johns. 457 [6 Am. Dec. 349]. The point was there very fully examined by Chief Justice Kent, who delivered the opinion of the court, and the import of the words "purchaser for a valuable consideration" was considered synonymous with *bona fide* purchaser. And it was held, that actual notice taken

away *bona fides* as effectually, under this act, as under the general registry act. The position was never doubted as to the latter, and was so expressly adjudged in *Jackson ex dem. Merrick v. Post*, 15 Wend. 588. The case of *Jackson v. Burgott* turned on the very points arising out of the identical statute on which the titles of these parties depend. The court held: 1. That actual notice was equivalent to registry; and, 2. That this was so as well at law as in equity. That it is so in equity is admitted by the English courts in respect to the Middlesex registry act, 7 Anne, c. 20, sec. 1, which was the model of this military registry act; though the king's bench, in *Doe ex dem. Robinson v. Alsop*,¹ 5 Barn. & Ald. 142, refused to import the equitable doctrine into a court of law. This is but little more, probably, than a dispute about form; at any rate, it is enough for us to see that the contrary has been long settled in this court.

But it is said that Clark bought of Schuyler on the faith of finding that his deed was first recorded, and that he shall not be holden to look farther, and run the hazard of actual notice to Schuyler. In *Jackson ex dem. Merrick v. Post*, it was held that the registry of a deed is notice to every one, from the time of its being recorded, even to a purchaser standing a second or farther remove from the common source of title. The same case held that, having such notice, the purchaser takes at the peril of his immediate grantor's title being impeached by actual notice, though his deed was recorded previous to the adverse one. This, it is true, was under the general registry act; but if the case of *Jackson v. Burgott* is to govern, the same rules apply to deeds of military bounty lands. That case holds, that actual notice is a substitute for registry. Under both acts, to entitle the purchaser to protection, he must be a *bona fide* purchaser in the strict sense of the term. He must not have notice when he buys. If the registry be notice, it takes away *bona fides*. There is nothing to distinguish the two acts in regard to the effect of registry. By both it is declared to be notice in much the same phraseology. Under the general registry act it is declared that every conveyance not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded: 1 R. S. 756, sec. 1. The act in question, 3 R. S. 188, sec. 1, is, that it "shall be adjudged fraudulent and void as against any subsequent purchaser, etc., for valuable considera-

1. *Doe v. Alsop*.

tion." The condition of the subsequent purchaser, as being mediate or immediate from the common source of title, and his liability to be affected with notice, must be the same in both cases. The only question which can arise is in respect to the quality of his purchase, the first-cited statute demanding *bona fides*, the latter not doing so in terms.

New trial denied.

The principal case is mentioned in *Foot v. Burch*, 5 Denio, 193; *Hooker v. Pierce*, 2 Hill, 654; *Jackson v. Leek*, 19 Wend. 341; *Lamerson v. Marvin*, 8 Barb. 13; *Schutt v. Large*, 6 Id. 381; and *Goelet v. McManus*, 1 Hun, 306. In most of these cases it is acquiesced in, though in some there is evident a desire to confine its operation as much as possible.

UNRECORDED INSTRUMENTS are valid between the parties and against all persons whose rights were acquired with notice thereof: *Grimstone v. Carter*, 24 Am. Dec. 230; *Fitzhugh v. Croghan*, 19 Id. 139; *Phillips v. Green*, 13 Id. 124; *Newman v. Chapman*, 14 Id. 766.

The syllabus to the principal case, contained in the original report, is likely to occasion a misapprehension of the law governing the rights of purchasers who acquire their title after two conveyances of the same property from a common grantor have been put upon record; and to produce the impression that the title of such purchaser must fail if deraigned through the second conveyance, though such conveyance was first recorded. But in the principal case, Philip H. Schuyler purchased with actual notice of the unrecorded conveyance made to James Van Rensselaer; and before Clark purchased of Schuyler, the deed to Van Rensselaer was upon record. At the time of Clark's purchase, therefore, he had constructive notice at least, of the deed to Van Rensselaer. Schuyler had in fact no title to convey, and Clark had notice that such might be the case. His purchase could not amount to anything unless Schuyler's purchase had been for value and without notice of the prior deed. It was clearly Clark's duty to inquire concerning the existence of those facts, in the absence of which his vendor had nothing to sell. But if Philip H. Schuyler's purchase had been for value, in good faith, and without notice of the Van Rensselaer conveyance, and had been first put upon record, then his (Schuyler's) title would have become perfect and indefeasible. The subsequent recording of Van Rensselaer's prior deed would in no wise divest P. H. Schuyler's title. In such circumstances, Schuyler's title being perfect, he could transmit it unimpaired to any other person, with or without notice of the prior deed to Van Rensselaer, and even in the absence of any valuable or other consideration: *Wood v. Chapin*, 13 N. Y. 518; *Webster v. Van Steenbergh*, 46 Barb. 214; *Jackson v. McChesney*, 7 Cow. 360; 17 Am. Dec. 521 and note.

DRIGGS v. DWIGHT.

[17 WENDELL, 71.]

SPECIAL DAMAGES ARISING FROM BREAKING UP AN ESTABLISHMENT and moving with family and furniture to other premises which the defendant had agreed to lease to plaintiff, may, though not specially alleged, be recovered, in an action for refusing to deliver possession and make the lease.

MEASURE OF DAMAGES FOR NOT GIVING A LEASE, is the actual value of the bargain plaintiff has made, and is not confined to the difference between the rent agreed to be paid and the actual value of the rent.

DEMAND FOR THE EXECUTION OF A LEASE NEED NOT BE PROVED, if it be shown that the landlord refused to give possession, and did not intend to comply with his contract to execute the lease.

VARIANCE not objected to at the trial is not available on writ of error.

ASSUMPSIT, by Dwight against Driggs, for not executing a lease and giving possession of a tavern stand. It appeared that Driggs agreed in case Dwight would find certain security for the payment of the rent, to let a tavern stand to the latter for one year, at two hundred and seventy-five dollars, and give possession between April 15 and May 1, 1834, and also to execute a lease when the possession was given. Dwight procured the security for the rent, and it was accepted by Driggs. Dwight, on May 1, demanded possession of the tavern, and was refused. He did not tender or demand any lease. He proved that he moved his family and furniture from Cambria to Tonawanda, in expectation of the lease, and being refused possession, was compelled to take them to Buffalo. This evidence was admitted against defendant's objection that no special damages were alleged. The jury was charged that plaintiff was entitled to all damages necessarily resulting from a breach of the contract, including the expense of removing his family and furniture. To this charge the defendant excepted, and also to the refusal of the court to instruct the jury that the measure of damages was the difference between the actual value of the rent and the sum which plaintiff had stipulated to pay; and that if plaintiff had agreed to pay more than a fair rent, he was entitled to nominal damages only. Plaintiff had verdict and judgment for two hundred and thirty-five dollars. Defendant Driggs sued out a writ of error.

M. T. Reynolds, for the plaintiff in error.

S. Stevens, contra.

By Court, COWEN, J. The objection of variance, as to the rent being payable quarterly, not having being raised on the trial, can not be urged upon a writ of error.

The plaintiff below was not bound to come with his lease executed, or to await the defendant's time to execute a lease and renew the demand, after the latter had peremptorily refused to give possession. That any such effort would have been in vain and idle, is evident from the previous attempt of the defendant

to procure the withdrawal of Nelson's name as security. If the defendant was desirous to profit by the indulgence due to a grantor or lessor in the allowance of time for preparing the conveyance, he should have said so, or at least not have taken ground which would have made a tender of a lease, or a demand of one, a most useless ceremony.

The measure of damages was certainly not confined to the difference of rent. The jury might look to the actual value of the bargain which the plaintiff had made.

As to the expense of the plaintiff's breaking up his former residence in Niagara and removing to Tonawanda, the declaration contained no special allegation of such loss; the inquiry is whether it be admissible under the averment of general damage, as being a direct and necessary consequence of the defendant's breach of contract. I have looked into *Ward v. Smith*, 11 Price, 19, cited by the defendant's counsel, and find it in point for letting in this proof under an allegation of general damage. Indeed, the case at bar bears, in all its features, a close resemblance to *Ward v. Smith*.

Judgment affirmed.

The principal case has been relied upon as authority, and followed upon the following propositions: An objection on the ground of variance is waived if not made at the trial: *Shall v. Lathrop*, 3 Hill, 238. That the measure of damages for not performing a contract may include the actual value of the bargain made, and may embrace expenses incurred by the plaintiff in preparing to comply with the contract on his part: *Freeman v. Clute*, 3 Barb. 428; *Giles v. O'Toole*, 4 Id. 263; *Lawrence v. Wardwell*, 6 Id. 426; *Farwell v. Davis*, 66 Id. 82; *Noyes v. Anderson*, 1 Duer, 352; *Baker v. Scott*, 2 N. Y. S. C. 82; *Bush v. Cole*, 28 N. Y. 270; *Taylor v. Bradley*, 39 Id. 142; *Pumpelly v. Phelps*, 40 Id. 67; *Latten v. Davis*, Hill & D. 15; *Blanchard v. Ely*, 21 Wend. 349. A demand is not necessary when an unqualified refusal has already been made: *McCool v. Jenkins*, 7 Rob. 118. In an action to recover from a lessor, for fraudulently refusing to give a lease according to his agreement, the plaintiff may recover more than the amount actually expended: *Carter v. Burr*, 39 Barb. 64.

BOOL v. MIX.

[17 WENDALL, 119.]

CONSTRUCTION OF DEVISE "unto my daughters, to be equally divided between them share and share alike, and to be to them for and during their natural life, and after their death then to be to their and each of their children, and to be divided between them, share and share alike," must be such as to give each daughter a life estate, with remainder to their children as tenants in common, the children taking *per stirpes*, not *per capita*.

PARTITION MADE BY TENANTS OF ESTATES FOR LIFE is not binding on those entitled to estates in remainder.

A MARRIED WOMAN MAY CONVEY HER REAL PROPERTY in this state by deed, though she could not do so at common law.

THE DEED OF AN INFANT FEME-COVERT has no greater effect than if she were unmarried.

INFANT'S DEED OF BARGAIN AND SALE IS VOIDABLE but not void.

INFANT'S DEED OF BARGAIN AND SALE MAY BE AVOIDED by his executing another deed to a third person after coming of age, or by an actual entry on the land for the purpose of disaffirming the deed, or by performing some other act clearly demonstrating his intent to avoid his deed.

ACTION TO RECOVER LANDS CONVEYED BY AN INFANT can not be maintained by him until he has first done some act which is sufficient to disaffirm and avoid his deed.

EJECTMENT, by Henry W. Bool and Sarah his wife, in right of the latter, who claimed under the will of Aert Middagh, executed January 7, 1777. In this will the testator gave the premises in controversy unto his two "daughters Margaretta and Magdalena, to be equally divided between them, share and share alike, and to be to them for and during their natural life; and after their death, then to be to their and each of their children, and to be divided between them, share and share alike." The devisees, Margaretta and Magdalena, took possession of the premises after the death of the testator, and partitioned them between themselves by deed of partition, by which the lands now sued for were assigned to Magdalena. Both died prior to the commencement of this action. Margaretta became the wife of George Moore and bore by him four children, viz., Sarah, the plaintiff herein, Elizabeth, Alexander, and George. Sarah intermarried with Joseph Caldwell while a minor, and before attaining her majority united with him in a conveyance to Frederick Mitchell, under whom the defendant deraigned title. Her first husband, Caldwell, having died in 1802 or 1803, she contracted a second marriage in 1830, with Bool, her co-plaintiff. The court instructed the jury to find for defendants, because it did not appear that the plaintiff, Sarah, had done any act looking to the disaffirmance of her deed to Mitchell. The defendants moved for a new trial.

W. Silliman and D. B. Ogden, for the plaintiffs.

P. W. Radcliff and S. P. Staples, for the defendant.

By Court, BRONSON, J. Some of the questions made on the argument were disposed of when the will of Aert Middagh was before the court in the case of *Jackson v. Luquere*, 5 Cow. 221. The daughters, Margaretta and Magdalena, severally took life

estates in the premises, with remainders to their respective children as tenants in common—the children taking *per stirpes*, and not *per capita*. In other words, the children of each daughter, immediately on the death of their mother, were entitled to an undivided half of the property. The partition made between Margaretta and Magdalena in 1793, was valid for their joint lives, but did not bind those who were entitled to the estates in remainder.

Magdalena died in 1825, leaving one daughter, Mrs. Starnes, who took an undivided half of the property. Margaretta and her husband, George Moore, had four children, who were entitled to the other undivided half. These remainders were vested in interest, though they were not entitled to the possession of the property until after the termination of the life estate of their mother. On the death of the two sons, Alexander and George, their two sisters, Mrs. Hunt and Mrs. Bool, took their interest in the estate as heirs at law: 1 Laws of N. Y., Greenl. ed. 207, fourth rule of descents. They were then seised in remainder of an undivided half, or either of an undivided fourth of the property; and became entitled to the possession on the death of their mother in 1820.

The plaintiffs claim an interest in fee under the will, and contend that this question was decided in their favor in the case of *Jackson v. Luquere*. Mr. Justice Woodworth, who delivered the opinion of the court, remarked, that on the death of either of the daughters of the testator, her portion of the estate “became vested in her children, as tenants in common in fee.” The question as to what quantity of interest the grandchildren of the testator took, was not before the court; the judge was discussing a different matter; and I have no doubt that the words “in fee” found their way into the opinion without any intention of passing upon the inquiry whether the grandchildren had an estate of inheritance, or for life only. It is impossible to read the will without perceiving that the question is of too grave a character to be disposed of in two words; and it should, I think, be regarded as still open for consideration. But it is unnecessary to decide on it on the present occasion; and as it was only discussed by the counsel for one party, I forbear to express any opinion on the point.

The plaintiff, Sarah Bool, at the time she executed the conveyance to Frederick Mitchell in 1794, was a *feme-covert* and an infant; and the principal questions in the case are: 1. Whether the deed was void, or only voidable; 2. If voidable

only, then whether it was necessary for her to do any act to avoid the conveyance before bringing this action; and, 8. Whether the deed has been confirmed by any act or omission on her part since she attained the age of twenty-one years.

Although the plaintiff was a *feme-covert*, her husband united with her in the conveyance, and the deed was acknowledged before a master in chancery in the form prescribed by law. The act of 1788, which was in force at the time, is substantially like the present statute in relation to acknowledgments by *femes-covert*: 2 Laws of N.Y., Greenl. ed., 99, sec. 3. At the common law, a woman during coverture could not alien her lands by deed; but she might do so by uniting with her husband in levying a fine, or suffering a common recovery, she being examined by the judges in relation to her consent. In this, as well as in most of the other states, an acknowledgment by the wife, or a private examination before some public officer, that the deed was executed freely, and without any fear or compulsion of her husband, has taken the place of the common law modes of assurance by fine and recovery. Our statute does not in terms enable the wife to alien in this manner, nor does it declare her conveyance valid. Negative words only are used. The acknowledgment of a married woman shall not be taken except in a particular manner, nor shall her estate pass by a conveyance not so acknowledged: 1 R. S. 758, sec. 10. Upon the ordinary rules of construction this would not be deemed an enabling, but a restraining statute. It seems to have been assumed that we had not adopted the common law rule, and that the deed of a *feme-covert* was effectual to pass her interest in lands.

A recurrence to the early colonial laws will shed some light on the peculiar phraseology of the statute. The fourth section of the act of October 30, 1710, provided that all deeds and conveyances, being duly acknowledged and recorded, or the transcript thereof, should be good evidence to all intents and purposes, as if the original were produced and proved in court: 3 R. S., App. 5. Nothing was said about acknowledgments by married women. From the act of February 16, 1771, 3 R. S., App. 22, it seems that their acknowledgments have been taken in the same form as though they had been *femes-sole*, and that a doubt had arisen whether such conveyances were valid. This act, after reciting that it had been an ancient practice in the colony to record deeds and conveyances upon the previous acknowledgment of the grantors, confirmed conveyances already made, notwithstanding any pretense that the wife had not been

privately examined. "But for the more solemn conveying and recording of real estates for the future," it was enacted, that "no estate of a *feme-covert* shall henceforth pass by her deed, without a previous acknowledgment made by her, apart from her husband;" and a certificate was to be made by the officer "that she had been privately examined, and confessed that she executed the same freely, without any fear or compulsion of her husband." Nearly the same language has been used in all the subsequent laws on the subject. Whether the common law rule in relation to alienations by married women was ever adopted in this state, 15 Johns. 109;¹ or if adopted, by what means it was subsequently modified, is not very material to the present inquiry. The act of 1771 assumed that *femes-covert* might alien by deed, and it prescribed the manner in which their acknowledgments should be taken for the future. There can be no doubt that the deed of the plaintiff, having been duly acknowledged, was as effectual to convey her interest as though she had been a *feme-sole*. Having complied with the requisitions of the statute, the disability resulting from coverture was completely obviated. There was no incapacity to alien her lands in that form.

The infancy of the plaintiff presents a distinct question from that of her coverture. Each disability must be considered by itself, neither can derive any additional force from being coupled with the other: *Phillips v. Green*, 3 Marsh. (Ky.) 7, and 5 Mon. 350 [13 Am. Dec. 124]. The case of *Sanford v. McLean*, 3 Paige, 117 [23 Am. Dec. 773], only decides, that the disability arising from infancy remains, although the infant, being also a *feme-covert*, acknowledged the deed in the form prescribed by law. To that doctrine I fully assent. The question then is, whether the deed of an infant be absolutely void, or only voidable. If an infant convey his lands by feoffment with livery of seisin, it has never been doubted that the estate passes. The deed is not a nullity, although it may be avoided by the grantor after he attains the age of twenty-one years. The deed executed by the plaintiff was a bargain and sale, and it is insisted that such a conveyance by an infant is utterly void. Perkins says, sec. 12: "All such gifts, grants, or deeds made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants, or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his

¹ *Jackson v. Gilchrist*.

estate." There has been much discussion in the books on the question whether delivery by the infant relates to the deed or conveyance, or to the possession of the land or thing sold. In *Zouch v. Parsons*, 3 Burr. 1794, it was held that a conveyance by lease and release executed by an infant without livery of seisin, was voidable only, not void. Lord Mansfield cites Bro. Abr. to prove that the delivery of a deed can not be void, but only voidable; and he adds, there is no difference in this respect between a feoffment and deeds which convey an interest; the reason is the same. The conveyance by lease and release, as well as that by bargain and sale, derives its operation from the statute of uses. The deed raises a use, to which the statute immediately transfers the possession, or legal seisin of the land. Corporeal investiture is not necessary to the perfection of the title.

In *Jackson v. Burchin*, 14 Johns. 124, a doubt was suggested whether a deed of bargain and sale by an infant, was not absolutely void; but the decision turned on another question. The case of *Zouch v. Parsons*, though it has been questioned in England, has never been overruled; and the principle of that decision has been often recognized in this and other states. In *Conroe v. Birdsall*, 1 Johns. Cas. 127 [1 Am. Dec. 105], it was held, that the bond of an infant, as well as other deeds which take effect by delivery of his hand, was only voidable, not absolutely void. In *Jackson v. Todd*, 6 Johns. 257, Dunbar, under whom the lessor claimed, was an infant at the time he conveyed, and although the fact is not expressly stated, there can be no doubt that the conveyance was by deed of bargain and sale. It was held that the deed was only voidable, and that the defendant did not stand in such a relation to the title that he could avoid it. In *Jackson v. Carpenter*, 11 Id. 539, the infant had conveyed by deed of bargain and sale, and the judgment proceeds on the ground that the deed was only voidable. In *Roof v. Stafford*, 7 Cow. 178, Woodworth, J., who delivered the opinion of the court, said he considered it now well settled, that the contracts of an infant, not only such as take effect by his actual delivery of the subject-matter (as a feoffment with livery, or a sale and manual delivery of goods), but all his deeds, whether at the common law, or under the statute of uses; whether relating to real or personal property, are voidable merely, not void. This doctrine was admitted by Chancellor Jones, and denied by no one, when the case was before the court for the correction of errors: 9 Cow. 626. The

rule seems to be universal, that all deeds or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority, which are void. And even in relation to a power of attorney, Parker, C. J., considered it a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, and that no satisfactory reason could be assigned for the exception: *Whitney v. Dutch*, 14 Mass. 462, 463 [7 Am. Dec. 229]. That a deed of bargain and sale executed by an infant is not void, see also, *Roberts v. Wiggins*, 1 N. H. 73 [8 Am. Dec. 38]; *Kline v. Beebe*, 6 Conn. 494; *Hubbard v. Cummings*, 1 Greenl. 11; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Phillips v. Green*, 3 Marsh. (Ky.) 7 [13 Am. Dec. 124]; 5 Mon. 350; Newl. Ch. Cont. 11; 2 Poth. 26. Chancellor Kent says, the doctrine of *Zouch v. Parsons* has been recognized as law in this country, and it is not now to be shaken: 2 Kent, 236. I entertain no doubt that the deed was voidable only, and not void.

Was it necessary for the plaintiff to do any act to avoid the deed before bringing this action? The general rule is, that the voidable act of an infant, if it be by matter of record, must be avoided by some matter of record, as by writ of error, or *audita querela*, and these must be prosecuted during his minority, that the infancy may be tried by inspection; but the act *in pais* of an infant may be avoided by some other act *in pais* of equal solemnity or notoriety. If there be a feoffment with livery, it may be avoided by entry, which is an act of equal notoriety. It may also be avoided by writ of *dum fuit infra ætatem*. The deed of an infant can not be avoided until he becomes of age, though he may enter and take the profits in the mean time. But it seems that a sale and manual delivery of chattels by an infant may be avoided while under age: Bac. Abr., Infancy and Age, I; Com. Dig., *Enfant*, c. 4, 5, 9; F. N. B. 192; *Roof v. Stafford*, 7 Cow. 179; 9 Id. 626. Some of the old books say that an infant may avoid his deed by entry before he becomes of age; but that is not the doctrine of the present day. He may enter while within age and take the profits until the time arrives when he has a legal capacity to affirm or disaffirm the deed; but the deed is not rendered utterly void by the entry; it may still be confirmed after he arrives at full age.

The deed of an infant may sometimes be avoided by plea, but the infancy must be specially pleaded, and can not be given in evidence under *non est factum*, because it is his deed until it has

been avoided: 3 Burr. 1805;¹ Bac. Abr., Infancy and Age 1, pl. 7. The remedy by plea is only applicable in the case of executory contracts, or where the question is presented in such a form that an opportunity to plead the infancy is presented. Where the contract is completely executed, as in the case of a conveyance of real estate, or a sale and manual delivery of chattels, an opportunity to plead the infancy can seldom arise, and the deed must be avoided in some other way: *Inhabitants of Worcester v. Eaton*, 13 Mass. 375 [7 Am. Dec. 155].

A deed of bargain and sale executed by an infant may, under certain circumstances, be avoided by another deed of bargain and sale to a third person after he becomes of age—that being an act of the same description and of equal notoriety with the original conveyance: *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Id. 124; *Tucker v. Moreland*, 10 Pet. 58. It was said in *Jackson v. Carpenter*, that the conveyance of the infant was not attended with all the solemnities of a feoffment and livery, and that it might be defeated by an act of the same description and of equal notoriety. In holding that an entry was not necessary to avoid the deed, stress was laid on the fact that the land was vacant and uncultivated, and an entry would have been useless. In *Jackson v. Burchin*, the land was also vacant at the time the second deed was executed, and the court say, the law does not require idle and non-essential ceremonies; and it would be idle to require an entry on the premises in 1795, when not only this lot but the whole country in which it was situated was almost a wilderness. In *Tucker v. Moreland*, the infant had never been out of possession. If in these cases the land had been held adversely to the infant, the second deed would, I think, have been void, and could not have amounted to a revocation of the first conveyance. This was admitted in *Jackson v. Burchin*. See also 13 Mass. 375.

Deeds procured by duress, or executed by persons of unsound mind, stand on nearly the same footing as the deeds of infants. In *Thompson v. Leach*, Carth. 435, the court say, there is a difference between a feoffment made *propriis manibus* of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, etc., which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in the law, and therefore the feoffment is not merely void, but voidable; but surrenders, grants, etc., by an idiot, are void at

1. *Zouch v. Parsons*.

initio. This case is also reported in 2 Salk. 427, Com. 45, and 1 Ld. Raym. 313. The doctrine that any deed of an infant or person *non compos mentis* is absolutely void, can not now be maintained. The case of *Conroe v. Birdsall* decides that the penal bond of an infant is only voidable, and in such a case there can be no semblance of benefit to the infant apparent on the face of the deed. The case of *Thompson v. Leach* takes the distinction which will be found in many of the old books, between deeds accompanied with livery, and those which are not followed by any such solemnity—holding the one voidable and the other void. But that is not the doctrine of the present day. It has been fully settled in this country, as we have already seen, that those deeds and conveyances by infants, which derive their operation from the statute of uses, are no less valid than conveyances by feoffment with livery. They vest the title and estate in the grantee; and if he enter under the deed, he has both the legal and actual seisin of the land, which can only be defeated by avoiding the conveyance. If a deed of bargain and sale by an infant stand on the same footing in this respect as a feoffment with livery, I can perceive no possible reason why the infant should not be required to avoid the deed by some act of the same nature and of equal notoriety that would be necessary in the case of a feoffment. In the case under consideration, the land is held under the infant's deed—the actual and legal seisin have been united. It is a lawful seisin, and I think the tenant can not be regarded as a trespasser and turned out of possession so long as the deed remains in force.

There is only one case in which an infant can avoid a feoffment with livery by action; that is, by writ of *dum fuit infra ætatem*, which sets forth the fact of infancy and seeks to avoid the deed on that ground: F. N. B. 192. In all other cases he must make an actual entry on the land, for the express purpose of disaffirming the deed. There is also a writ of entry for a person who has conveyed when of unsound mind, called, from the recital in it, *dum fuit non compos mentis*: Id. 202. This, like the writ of entry by an infant, was devised for the express purpose of enabling the party to avoid the deed by an appropriate action. The cases in this court which have held that no entry was necessary, are put upon the ground that the land was vacant, and that an entry would have been an idle ceremony. But it is otherwise in this case. An entry here, for the purpose of avoiding the deed, was but an act of justice to

the tenant, before treating him as a trespasser and subjecting him to costs and mesne profits.

In the *Inhabitants of Worcester v. Eaton*, 13 Mass. 375 [7 Am. Dec. 155], the first deed had been obtained by duress. From the report of the same case in 11 Id. 368, it will be seen that the grantor afterwards entered upon the premises, claiming and declaring that she entered for the purpose of possessing herself of the land, and enabling herself to make a conveyance; and a second deed was executed while she was on the land. Chief Justice Parker likens it to the deed of an infant, and he says, that until the deed is avoided, no subsequent conveyance by the grantor can be good; the title will remain good to the grantee, by virtue of such deed, until the grantor shall lawfully disaffirm it. He can do it only by entry; but having entered, his subsequent deed, accompanied by proof of facts tending to avoid the first, will convey a title. It was added, that the deed of the tenant (the one obtained by duress) being wholly avoided, he must be considered a disseisor. In *Roberts v. Wiggins*, 1 N. H. 73 [8 Am. Dec. 38], it was said, that in general an infant, to avoid his deed, must re-enter on the land and oust the occupant; or, if already in possession, must perform some act explicitly evincing his intention to defeat the conveyance.

It is unnecessary, on the present occasion, to say that an entry on the land was the only mode in which the deed could be avoided, for the plaintiff, previous to bringing the action, had done no act whatever to disaffirm the conveyance. She had not even demanded possession of the land, or given notice to the tenant that she did not intend to be bound by the deed.

If one who has aliened his estate while an infant wishes afterwards to avoid the conveyance, it is imposing no unreasonable burden to require that it shall be done by an entry on the land, or by some other act of equal notoriety; and the avoidance, whatever may be its form, must precede the bringing of an action to recover possession. Justice to the tenant requires it; and there is no other way in which we can carry out the doctrine that the deed of an infant is voidable only, and not void. Although the title of the tenant may be defeated, yet, so long as the deed remains unrevoked, he has the legal seisin of the land, and can not be sued as a trespasser. It is little better than a contradiction in terms, to say that a man who has the rightful possession of lands can be treated as a wrong-doer. In the case under consideration, the deed remained in full force

at the time the action was brought; the possession of the defendant was not tortious, and the action of ejectment can not be maintained.

The opinion already expressed renders it unnecessary to inquire whether the deed has been confirmed by any act or omission on the part of the plaintiff since she became of age.

New trial denied.

CONVEYANCES BY INFANTS are generally not void, but voidable only; and, until avoided, the grantee holds the legal estate: *Van Nostrand v. Wright*, Hill & D. 263; *Gillett v. Stanley*, 1 Hill, 125; *McIlvaine v. Kadel*, 30 How. Pr. 194; S. C., 3 Rob. 431; *Dominick v. Michael*, 4 Sandf. 419; *Porter v. Bleiler*, 17 Barb. 153; *Voorhees v. Voorhees*, 24 Id. 152; *Wetmore v. Kessain*, 3 Bosw. 327; *Wheaton v. East*, 26 Am. Dec. 251 and note; *Lawson v. Lovejoy*, 23 Id. 526 and note; *Guthrie v. Murphy*, 21 Id. 681. Nearly all the contracts of an infant, unless for necessities, are voidable at his election, and his executory contracts and contracts of sale may be avoided by him during his minority: 17 Id. 430.

MORTGAGE BY AN INFANT is not void, nor is it avoided by his conveyance of the same property after attaining his majority. He may, after such conveyance, ratify the mortgage, which, on being thus ratified, will be effectual from its date, and take precedence over subsequent alienations: *Palmer v. Miller*, 25 Barb. 402.

INFANT'S SEALED DELEGATION of a naked authority is void: *Brown v. Town of Canton*, 4 Lans. 414.

INFANT WHO MAKES A CONVEYANCE MAY AVOID IT on coming of age or within a reasonable time thereafter: *Medbury v. Watrous*, 7 Hill, 113; *Chapin v. Shafer*, 49 N. Y. 412; *Breckenridge's Heirs v. Ormsby*, 19 Am. Dec. 71; *Phillips v. Green*, 13 Id. 124 and note; *Roberts v. Wiggin*, 8 Id. 38. There is a strong analogy between a lunatic and an infant in relation to their power to contract; either can oblige himself for necessities, and the law provides for such a formal process by which to avoid his agreements: *Ingraham v. Baldwin*, 9 N. Y. 48; *Breckenridge's Heirs v. Ormsby*, 19 Am. Dec. 71.

If a devise be made to the children or heirs of A., B., C., and D., their children take *per stirpes* and not *per capita*: *Newell v. Nichols*, 12 Hun, 624. A usage grew up at an early period of the colonial history of New York, under which married women were authorized to convey their estates by uniting with their husbands, without resorting to the common law mode of fine and recovery: *Constantine v. Van Winkle*, 2 Hill, 241; S. C., 6 Id. 200.

A MARRIED WOMAN COULD NOT AT THE COMMON LAW ALIENATE her lands by deed, even though her husband joined with her. Her deed was void. She could transfer her interest only by levying a fine or suffering a common recovery: *Albany F. I. Co. v. Bay*, 4 N. Y. 12; *Phillips v. Green*, 13 Am. Dec. 124.

In *Sherman v. Garfield*, 1 Denio, 330, the court say that in *Bool v. Mix* the infant *feme-covert* had an estate in the land at the time of the conveyance, and that this conveyance never having been disaffirmed, operated upon such estate, but that if she had had no estate in the land in her own right, but only a capacity to be endowed in case of her surviving her husband, then her conveyance had nothing to operate upon, and could not defeat her right to dower upon the subsequent death of her husband.

HUNT v. SMITH.

[17 WENDELL, 179.]

RELEASE OF GUARANTOR.—If an order be drawn on a storekeeper, agreeing to be accountable to the amount of seventy dollars, for goods to be furnished to a third person, and requesting the amount of the bill to be sent him, and the storekeeper sells such third person goods to the amount of one hundred and two dollars and eighty-one cents, for which he takes a note due in thirty days, the drawer of the order is released; because his position is that of guarantor, and the taking of the note is an extension of time to the principal.

ASSUMPSIT on the following order addressed to the plaintiff, Hunt: “You may let the bearer, Mr. Horace Putnam, have, in such articles as he may want out of your store, to the amount of seventy dollars, if he wishes to get that amount, and I will be accountable for that sum. Have the goodness to send the amount of his bill by him to me. July 2, 1833.” Putnam had, the day after the order was given, obtained goods of Hunt to the value of one hundred and two dollars and eighty-one cents, and given his note therefor, due in thirty days.

J. H. Ostrom and T. R. Walker, for the plaintiff.

W. C. Noyes, for the defendant.

By Court, COWEN, J. It appears to me that here was in the outset a fatal departure from the terms of the guaranty. The defendant undertakes to be accountable for goods to seventy dollars, and directs a bill to be sent. The delivery is of goods to one hundred and two dollars and eighty-one cents, on a note of the vendee at thirty days. I can not understand the engagement otherwise than as an undertaking to pay presently, or at least as reserving the right to pay presently the bill of seventy dollars. That would give a remedy over against the principal instantly, either for money paid, or, if any better, a right to insist on a direct and immediate suit against Putnam for the money. These remedies are both suspended by the act of the plaintiff. It is perfectly well settled that such an extension, given to the principal for a precedent debt, discharges the guarantor: *Coombe v. Woolf*, 8 Bing. 156. The principles on which such a consequence follows are there fully explained. The only difference between the two cases is that in *Coombe v. Woolf*, the guaranty was at first followed and afterwards violated by extending a credit on the note of the principal; whereas here it was departed from in the first instance, or in other words, never followed at all. If a credit of thirty days could be given,

why not one of thirty years, within the same principle? The terms of these guaranties must be exactly pursued, or the guarantor is never liable at all: *Wright v. Johnston*,¹ 8 Wend. 512; Id. 526, *per* Nelson, J.; *Miller v. Stewart*, 4 Wash. C. C. 26, 28; 9 Wheat. 680, 702, *et seq.*² All these cases agree that it can make no difference whether the surety be ultimately benefited or injured by the departure. It is enough that he may be injured. This is no more than giving him the right of every other man, to fix the terms on which he will contract originally, and to insist throughout that his rights shall not be varied without his own consent. The principle on which the cases proceed, both at law and in equity, for the rule is the same in both, are very ably expounded by Lord Eldon, in *Samuel v. Howarth*,³ 3 Meriv. 272, 277-279, Lond. ed.

Judgment for the defendant.

GUARANTOR OR SURETY IS DISCHARGED by any alteration in the contract made without his assent: *Fellows v. Prentiss*, 3 Denio, 521; *Bigelow v. Benton*, 14 Barb. 128; *Bank of Montpelier v. Dillon*, 24 Am. Dec. 640 and note; *Craig v. Cox*, 5 Id. 609; *Ludlow v. Simond*, 2 Id. 291; *Cope v. Smith*, 11 Id. 582 and note.

GIBSON v. CULVER AND BROWN.

[17 WENDELL, 305.]

DELIVERY BY CARRIER MUST BE TO THE CONSIGNEE PERSONALLY, unless some usage or agreement is shown to the contrary.

UNIFORM USAGE AND COURSE OF BUSINESS on the part of the proprietors of a stage line, to leave goods at their stage-houses, to be called for by the consignees, may be proved to relieve them from liability for not delivering the goods to a consignee nor giving him notice of their arrival.

CASE against defendants as common carriers. They were proprietors of a stage line, on which the plaintiff, at Leominster, Mass., shipped a box of combs directed to Vail & Co., Troy, N. Y. The box was carried by defendants to Troy, and there left in their stage-house; but no notice of its arrival was given, nor did it ever reach the consignees, who were an old, well-known firm, whose store the stage passed in its most direct route to the post-office. The defendants offered to prove that it was their uniform custom and course of business to leave goods at their stage-house at Troy, and not to deliver them to the consignees; that a similar custom prevailed over the whole course of this particular line of stages, and was the general

1. *Wright v. Johnson*.

2. *Id.*

3. *Samuel v. Howarth*.

custom of all lines of stages in the state. The evidence being rejected, the plaintiffs had judgment. Defendants moved for a new trial.

D. L. Seymour, for the motion.

G. Palmer and D. Buel, jun., contra.

By Court, COWEN, J. The offer of the defendants presupposed, what is now conceded, and is indeed extremely well settled, that *prima facie* the carrier is under an obligation to deliver the goods to the consignee personally. The authorities to this point are nearly all collected in Story on Bail. 346, n. 3; and 2 Kent Com. 604, 605; see also *Golden v. Manning*, 3 Wils. 425,¹ 433; Owen, 57; and *Storr v. Crowley*, 1 McClell. & Y. 129, 138, *per* Hullock, B.

It would be too much, perhaps, to say that a uniform and well-known usage, in either form put by the defendants in their offer, might not be received to govern the delivery. This is, I find, a very common head of evidence in fixing the obligation of bailees. Where the nature of the bailment raises an inquiry as to degrees of care, the customary modes of securing the articles are open to inquiry: Story on Bail. 9, 10. So, as to the accompaniments with which a hired thing is to be delivered: Id. 256; and the place in which an innkeeper is bound to keep the horse or carriage of his guest: Id. 312; 2 Kent Com. 592, 3d ed. In *Garside v. The Proprietors of the Trent and Mersey Navigation Company*, 4 T. R. 581, usage and course of business were received, to determine whether the defendants, at the time when the goods were burned, held them as common carriers or mere wharfingers for the plaintiffs. The proof, too, was confined to the course of business in the particular line of stages, and determined the cause in favor of the defendants. In *Hyde v. The Proprietors etc.*, 5 Id. 389, Grose, J., who concurred with Ashurst and Buller, JJ., that carriers by a canal must, by the general law, make a personal delivery to the consignee, agreed that the obligation might be affected by the customs of the trade. Nor do I understand the force of usage in such a case to be denied, but, on the contrary, it is expressly admitted in *Ostrander v. Brown*, 15 Johns. 39 [8 Am. Dec 211].

In *Sewall v. Allen*, 6 Wend. 335, evidence of usage and practice was received to show that the defendants were common carriers of bank bills: See Id. 350, 351, 360. In *Barnes v. Foley*, 5 Burr. 2711, the question was, whether it was the duty

1. 3 Wils. 429.

of the post-master at Bath to deliver letters to the inhabitants at their houses. Proof of usage was resorted to, and Mr. Justice Aston said: "The limits of the delivery are to be determined by the usage of the place:" p. 2714; and in *Rushford v. Hadfield et al.*, 7 East, 224, all the court agreed in the propriety of receiving such evidence to enlarge the rights of carriers. The defendants claimed a lien on the goods, not only for the price of carrying them in particular, but for a general balance due to them for previous carriage. The law denies to the carriers a claim for a general balance; but a long train of evidence was received, to show that custom and the course of trade among a particular sort of carriers had overcome the law. The jury found against the defendants; but the evidence was so imposing that they moved for a new trial, as for a finding against the weight of evidence; and the case details all the proofs. The judges proceeded to a full examination of them, and a new trial was denied; but the case shows, and all the judges concur in declaring the principles on which such evidence is to be received. The cause was tried before Chambre, J., who put it to the jury, whether the usage were so general as to warrant them in presuming that the parties who delivered the goods to be carried knew it, and understood that they were contracting with the carriers in conformity to it; if not, the general rule of law would entitle the plaintiffs to a verdict. All the judges concurred that a custom of this kind, which is, *quoad hoc*, to supersede the general law of the land, should be clearly proved, and the interested encroachments of persons engaged in a particular trade, watched with great jealousy. None of them disapproved the qualifications under which the case went to the jury; and Lord Ellenborough, C. J., and Grose, J. put it on the ground of a usage so general, and so uniformly acquiesced in for a length of time, that the jury would feel themselves constrained to say it entered into the minds of the parties and made a part of the contract. But all this has nothing to do with the abstract question of competency. Usage, when it goes to change the law, always comes in subject to the principles declared in that case; yet if counsel propose to prove such a usage, and think they can establish it, I am aware of no rule which forbids the attempt.

We are referred by the plaintiff's counsel to general propositions, well established by the cases. In *Firth v. Barker*, 2 Johns. 335, we are told that usage never should be received to contradict a settled rule of commercial law. That was said on

the authority of *Edie v. East India Company*, 2 Burr, 1216, wherein Lord Mansfield had received evidence, at *nisi prius*, of the custom of merchants, that in case of a bill of exchange, payable to order, the indorsement was restrictive, unless that also contained the word order. At the bar, on motion for a new trial, he and the other judges agreed, that the law being settled, the custom of merchants could not control it; that is to say, it would not subvert the law of the land as such; not that the parties might not make the indorsement restrictive by special agreement, or by the customary course of some particular business make an exception in their own case, leaving the general law to take its course. But in that case, the bill of exchange was drawn in the East Indies, and the main evidence came from bankers in London. Their opinion was taken to overturn a rule of law which pervaded the whole empire, and, indeed, the whole commercial world; and the jury were allowed to judge of that rule as they should take it from witnesses, and not from the judge. See also *Newbold v. Wright*, 4 Rawle, 195. And it was to a rule like this, a rule of general law, to which Dallas, C. J., was speaking, in *Butt v. Conant*, 1 Brod. & B. 548, when he says: "If the practice were against the first principles of constitutional law, and an encroachment upon the rights of the subject, I would not hold it to be law, if it had existed from the foundation of Rome." If what had existed? The practice of a common magistrate to commit for a libel. That, though general and ancient, if contrary to the constitution, would not be received to subvert the constitution in that respect. Yet, even in such a case, he considered practice as high evidence of the law, and ordered precedents to be searched; and finally, not being met by the constitution, he sanctioned the exercise of the power. Plowd. 170, is also cited, that custom can not make land appurtenant to land, because it is legally impossible that one thing should be appurtenant to another of the same kind; and 2 D'Anv. Abr. 424, 427, to the general proposition against unreasonable customs. Both books, however, agree that reasonable customs, that is to say, those which may stand with law and policy, may be allowed, and form exceptions to the general rule. It would be too much to say, that one delivering goods to a carrier by stage, may not expressly, or which is the same thing, if he knows the usage of the stages to be so, impliedly consent to a delivery at the stopping-place, instead of his consignee's place of business. In *Hyde v. The Trent and Mersey Navigation Company*, Lord Kenyon,

C. J., went into a very elaborate argument, to prove that stage-men and other carriers had this right by the general law. It would, after that, be arrogant to condemn the conventional right as illegal, or contrary to sound policy. I say conventional, because I agree that these cases must be limited by the rule of *Bushford v. Hadfield*. *Rapp v. Palmer*, 3 Watts, 178, is against the plaintiff, though supposed by his counsel to be the other way. A carrier on the Ohio, without any express authority, sold a cargo of corn; and in trover by the owner, against the vendee, he set up the custom of carriers along the Ohio and Mississippi, to sell in that way. The court do not deny, that such a custom, being ancient, certain, uniform, and reasonable, might make an exception. But they rely on the weakness of the proof. It went mostly, to fraudulent cases of sale, and freighters would have no security against endless abuse, if it were once known that carriers, along our rivers and canals, could make a good title without express authority to sell. There is more reason in the case at bar, than in ordinary lines of carriage not bound to a conveyance and a delivery of the mail.

I know the law deals with common carriers in very strict measure, which ought not to be relaxed, on slight evidence. In *Richmond v. Smith*, 8 Barn. & Cress. 9, a guest ordered some of his luggage to be placed in the commercial room, whereas it was customary with the innkeeper to order it into his guests' bedrooms. The guest ordered it out of the commercial room, and exposed a part of it for sale, and returned the residue to the same room, whence it was stolen. The court said the innkeeper was like a common carrier, and could not get rid of his common law liability without giving express notice. Lord Tenterden, C. J., said, that if the defendant did not mean to be liable for goods thus placed, he should have said so. As Story, J., remarks, the case did not call for the dictum resembling the case to one of a common carrier: Story on Bail. 309. But suppose the guest had come to a full knowledge of the landlord's practice, either by its general notoriety, or in any other way, it appears to me, this would have been equivalent to express notice. It would have been so within several of the cases cited. It is more reasonable in the case of an obligation, to deliver personally by common carriers. That must, in the nature of things, be many times dispensed with. Carriers, by ships and boats, must stop at the wharf; railroad cars must remain on the track. In these cases, notice should be given to

the consignee, of the arrival and place of deposit, which comes in lieu of personal delivery: See 2 Kent Com. 605, 3d ed., and the cases there cited.

In *Golden v. Manning*, 2 Bl. 916; S. C., 3 Wils. 425,¹ 433; and see *Storr v. Crowley*, 1 McClel. & Y. 129, Gould, J., said, he thought that all carriers are bound to give notice of the arrival of goods, to the persons to whom they are consigned, whether bound to deliver or not. *Prima facie* this must be so, unless the notice is also dispensed with by the custom. Gould, J., was speaking of this very case, of a land carrier; and I do not well see how the carrier can escape the imputation of gross negligence, if he do not, at least, give notice, in order that the consignee may send for the goods. How is he, otherwise, to find out the fact of the delivery? Lord Kenyon, C. J., in the opinion before cited, thought he was to learn it by a letter of advice which should be sent by the consignor. But that can not always state the place, much less the exact time of the delivery at the inn. His lordship suggested, that the business of delivery might be left to the innkeeper, who should send his porter. All these things may, I agree, be possibly explained, by the custom proposed to be given in evidence. I do not understand that the defendants here gave any notice to the consignees, although they might have been easily traced by the superscription. They rested everything on the custom. The proposition, therefore, struck me at first as too short. I thought it should have come up to a custom of delivering at the inn, without notice to the consignee. The offer may, for ought I know, be equivalent to that. I should think it essential, either to establish one of the customs as proposed, and follow it with proof of actual notice, to show that the custom dispensed with notice. Such a custom of such age, uniformity, and notoriety, that a jury would feel clear in saying it was known to the plaintiff, I think would be admissible. He would be bound by it, the same as if he had directed a delivery at the inn. And on the offer made and overruled, I therefore think there should be a new trial; the costs to abide the event.

USAGE OF BUSINESS, a carrier is exonerated who complies with, whether the consignor knew of it or not: *Sage v. Gittner*, 11 Barb. 123; *Van Santvoord v. St. John*, 6 Hill, 157, 167; *Fubbri v. Mercantile M. I. Co.*, 64 Barb. 95; *Henshaw v. Rowland*, 54 N. Y. 243.

COMMON CARRIERS must usually seek the consignee at his residence or place of business, and make or tender delivery to him, or at least notify him

of the arrival of his goods: *Clark v. Masters*, 1 Bosw. 183; *Fisk v. Newton*, 1 Denio, 47; *Schroeder v. Hudson River R. R. Co.*, 5 Duer, 62; *Place v. Union Express Co.*, 2 Hilt. 27; *Rowland v. Miln*, Id. 152; *Price v. Powell*, 3 N. Y. 326; *Miller v. Steam N. Co.*, 10 Id. 438; *McDonald v. W. R. R. Corp.*, 34 Id. 501; *Witbeck v. Holland*, 45 Id. 17; *Cole v. Goodwin*, 19 Wend. 258.

USAGE, TO BE BINDING, must be well known and reasonable: *Rawson v. Holland*, 59 N. Y. 618. The delivery of goods by a carrier at a tavern or known stopping-place, where they are always in charge of some one, or on a wharf, after giving notice to consignee, may be sanctioned by usage; but this is very different from abandoning parcels in an exposed place, and notifying the owners of such abandonment: *Haslam v. Adams Express Co.*, 6 Bosw. 243. "Independent of contract, at common law, or by custom of the realm, the duty and liability of a common carrier commenced with the receipt of the goods, and ended only with their delivery according to the undertaking or trust assumed:" *Burtis v. Buffalo S. L. R. R. Co.*, 24 N. Y. 280.

CARRIERS BY RAILROAD OR BY WATER are not bound to deliver the goods, except at their wharf or depot; and notice to the consignee of their arrival and of readiness to deliver, "comes in place of personal delivery, so far as to release the carrier from the extraordinary and stringent liability incident to that class of bailees:" *Zinn v. N. J. Steamboat Co.*, 49 N. Y. 444.

USAGE TO VARY LIABILITY OF CARRIERS.—For cases in this series upon this subject, see *Turney v. Wilson*, 27 Am. Dec. 515, and note at p. 518.

COMMON CARRIERS.—Delivery by, and what will exonerate them from liability for want of: *Young v. Smith*, 28 Am. Dec. 57; *Bean v. Sturtevant*, Id. 389; *Camden R. R. Co. v. Burke*, Id. 488; *Parsons v. Hardy*, Id. 521 and note; *De Mott v. Laraway*, Id. 523; *Daggett v. Shaw*, 25 Id. 439; *Kohn v. Packard*, 23 Id. 453; *Ostrander v. Brown*, 8 Id. 211 and note.

PEOPLE v. CLOUGH.

[17 WENDELL, 351.]

OBTAINING CHARITABLE DONATION BY FALSE PRETENSES and misrepresentations is not indictable.

INDICTMENT against the defendant, for obtaining money by false pretenses, by representing himself to be deaf and dumb, and thereby obtaining donations of money. Demurrer to the indictment, which was overruled; but judgment suspended until the opinion of this court could be had.

Z. T. Newcomb, for the defendant.

J. J. Briggs, for the people.

By Court, COWEN, J. The decision of this case depends upon the question whether the statute to punish the obtaining of money or goods by false pretenses was intended to protect the citizen from frauds beyond his commercial dealings, and to reach forgeries and other like pretenses commonly got up by beggars to excite compassion and induce acts of charity in favor of

themselves or others. I find no case or dictum bringing this class of persons within the operation of this statute. In 2 Russ. on Crimes, 289, a case is put, which the writer represents as a curious species of indictable fraud, viz., that of a man who maimed himself in order to have a more specious pretense for asking charity, and Coke, Hale, and Hawkins are referred to. This led me to examine the authors alluded to, and I find that none of them put the case on the fraud, but on the mayhem, and accordingly treat of it under the title "Maiming." They all go on the case stated by Lord Coke, who says: "In my circuit in anno 1 Jacobi Regis, in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himself impotent, thereby to have the more color to begge, or to be relieved without putting himself to any labor, caused his companion to strike off his left hand, and both of them were indicted, fined, and ransomed therefor; and that by the opinion of the rest of the justices for the cause aforesaid:" Co. Lit. 127 a. This and other cases are introduced by Lord Coke, with the observation, "Note, the life and members of every subject are under the safeguard and protection of the king." So that the indictment was clearly not for the fraud. I have looked into the books farther, and failed to find a single case which holds a false pretense of any kind to the end that another should do a charitable act, to be indictable. The absence of any such authority, especially in England, where beggars greatly abound, drilled and practiced too, in all the fraudulent devices of their trade, is itself enough to raise a doubt. The exercise of the virtue of charity has practically been left, where I suspect the law intended it should remain, upon the basis of the mere moral duty, both of the beggar and donor. The virtue is sufficiently cold, inquisitive, and scrupulous to be safe without the protection of the criminal law. The duty of the donor is one of imperfect obligation, and I am not aware that the beggar's duty as to the means of calling it into exercise is anything more. I should even doubt whether an action for money had and received would lie to recover back a charitable advance made on a false pretense; for I believe the understanding is, always to let the scanty pittance go on the representation, true or false, better or worse, without any implied duty of restoration.

I admit that the crime in question is one of a very dark moral grade. So are adultery, ingratitude towards benefactors, and various other moral offenses not noticed by the criminal law. I admit also that it is within the words of our statute, and

within the enacting clause of 30 Geo. II., c. 24, from which our statute is copied. Our system of revision, however, has in this as in many other cases, unfortunately obscured the history and reason of the law, not only by alterations of words, but many times by dropping the recital. The true reason of both the English and New York statutes was doubtless the same; and it will be useful, therefore, to look at the reasons stated for the first. After reciting, "Whereas divers evil-disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats, and devices, fraudulently obtained divers sums of money, goods, wares, and merchandises, to the great injury of industrious families, and to the manifest prejudice of trade and credit," the statute proceeds as follows: "Therefore, for the punishing of all such offenders, be it enacted, etc., that from and after, etc., all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares, or merchandises, with intent to cheat or defraud any person or persons of the same; or shall send, etc. (a threatening letter) with a view to extort, etc., shall be deemed offenders against law and the public peace." It then prescribes the punishment, which is to be by fine, imprisonment, pillory, whipping, or transportation to this country: 22 Pick. Stat. at Large, 114. Looking merely to these punishments, one can not but admit that some of them are admirably calculated for such "lustie rogues" as he of my Lord Coke, and many others; but the recital seems clearly to point out evils entirely different from any which ever arose in the history of charity. When did we ever hear of industrious families ruined, and certainly never of any prejudice to trade or credit, under any system of fraudulent beggary? On the contrary, our books of morals and tales, with a few scattering exceptions, are continually complaining of deaf ears and hard hearts, even when addressed by the best authenticated stories of real distress; so much so, indeed, that our law has been obliged to interpose a system of regulated public charity for the protection of the honest sufferer. Nay, it makes the offense of begging, a crime, punishable by summary proceeding before a magistrate: 1 R. S. 640, 641, 2d ed., secs. 1, 3. Looking to our statute, the man who merely gives to a beggar, without ordering him instantly to be taken into custody and carried before a justice of the peace, as he may do, Id. sec. 2, would seem to be a moral participant in the crime of vagrancy. It would sound somewhat extravagant,

were we to apply a law severely penal to the protection of such an act.

On the whole, we all feel quite clear that this indictment is not sustainable. We all agree that the pretense, had it been exercised in a matter of trade or credit, would have fallen within the statute; but we can not bring ourselves to hold that this or any pretense resorted to merely to enforce a beggar's request, is cognizable by the criminal law. The sessions are advised to discharge the defendant.

The principal case is referred to in subsequent decisions as showing that the statute against obtaining money by false pretenses was intended for the protection of trade and commerce only: *McCord v. People*, 46 N. Y. 476; *People v. Stetson*, 4 Barb. 156.

LOOMIS v. TERRY.

[17 WENDELL, 496.]

WANTON, WILLFUL INJURY done to man or beast while trespassing can not be justified.

ONE WHO PERMITS A FIERCE AND DANGEROUS DOG to run at large on his premises is liable, if it there inflicts injuries upon a person in the day-time, though such person is technically guilty of trespass in being on the premises.

FOR PROTECTION AGAINST TRESPASSERS, one may make defensive erections, or keep defensive animals; but he must not proceed in disregard of human safety, nor further than necessity requires, and should give notice of the presence of the dangerous instrument or animal.

CASE, by Terry against Loomis, for keeping dogs accustomed to bite mankind, and which did bite plaintiff's son. It appeared that the son, aged about sixteen years, was with other boys hunting in the woods on defendant's premises, when he was attacked, seized, and thrown down by a hound, and while down was also attacked by a slut; was severely bitten by the dogs, but at the end of five or six minutes rescued by his companions. Before that time the hound had attacked and bitten a man on horseback. The defendant showed that he had sold the slut about a year before; but it was shown that she had returned to and been harbored by him. Loomis said he wished the dogs had eaten the boy up. Verdict for plaintiff. Defendant prosecuted writ of error.

W. C. Noyes, for the plaintiff in error.

P. Gridley, contra.

By Court, COWEN, J. No doubt the plaintiff's son was a trespasser on the defendant's premises. It is said the general practice of entering on another's grounds to hunt for wild animals would warrant the jury in finding a license. No evidence was given of that practice; and the jury must, I think, have found as matter of law, that a trespasser is not without protection from a ferocious dog on the premises. Whether he forfeits all protection from the mere circumstance of being wrongfully there, is the question, and I think the only question of law which the plaintiff in error can raise upon the justice's return.

The counsel for the defendant in error is doubtless right when he says that a willful and wanton injury by the owner, done to a man or even his beast which is trespassing, can not be justified: *Per* Burrough, J., in *Deane v. Clayton*, 7 Taunt. 496, 497, 498, 505; Park, J., *Id.* 510. All necessary force to resist the entry, or eject the trespasser after he shall have intruded into the premises, is the utmost remedy which the law allows by the act of the party injured. But that is a different question. May a man knowingly keep on his premises a ferocious dog, in such a way that he will worry ordinary trespassers in the day-time, without notice of the fact? I think we must take the case thus strongly against the defendant below on the finding of the jury. The distinction between acts done by the owner to repel a trespass, he being present, and his taking measures for the general protection of his rights during his absence, appears to me to be very well considered by Dallas, J., in *Deane v. Clayton*, 7 *Id.* 519, 520. In the former case he can fix himself the necessary measure of violence; in the latter, he can only provide the means with a measure of prudence adapted to his general purpose, and the trespasser must act at his peril.

But the case before us is not one of a man keeping a dog for the necessary defense of his garden, his house, or his field, and cautiously using him for that purpose in the night-time: *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 297. It is not the case of keeping a useful domestic animal, a mischievous bull for instance, in a remote inclosure: *Per* Lord Kenyon in *Brock v. Copeland*, 1 Esp. 204. It is not like setting spring-guns with public notice of the fact; for even that has been held warrantable as being necessary: *Ilott v. Wilkes*, 3 Barn. & Ald. 304. Other like instances are put in that case. And see 7 Taunt. 497, *per* Burrough, J. Where a dog is lawfully kept for the purposes of protection, a trespasser can not maintain an action for

an injury, if he come in the way of the dog: *Sarch v. Blackburn*, 4 Car. & P. 297; S. C., 1 Moo. & M. 505. And there can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that in these and the like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way. That has been held of spring-guns: *Bird v. Holbrook*, 4 Bing. 628; and it goes on the principle that secrecy is not necessary to the object, or, at least, not so necessary that the means may be used to the hazard of human life or human safety. This doctrine was much discussed in the case of *Deane v. Clayton*, 7 Taunt. 489; 2 Marsh. 277;¹ and S. C., 1 B. Moore, 203. The arguments of counsel are to be found only in Marshall. There, the defensive erection was spikes or dog-spears, fixed along hare-paths, for the destruction of dogs upon the defendant's premises. The plaintiff's dog being decoyed by a hare and killed, the judges of the common pleas were equally divided on the question, whether an action lay by the owner of the trespassing dog. But I understand them all to agree, that the case would have been different were the life or even the safety of a human being thus put in hazard. Dallas, J., who was against the action in that case, yet admitted that "the law distinguishes to many and most essential purposes between property and the life of a man." In respect to such defenses thus applied, Best, C. J., said in both *Hott v. Wilkes* and *Bird v. Holbrook*: "Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity." Much reliance in *Deane v. Clayton* was placed on the want of notice, by Burrough, J. Park, J., said, that with notice, the plaintiff did all he could to keep his dog away.

But what shall we say of a case involving human safety, perhaps human life (for I think had not others ran to the rescue of the boy, the dogs would have killed him), where a fierce dog is kept without semblance of necessity; a dog which the defendant insisted, as a main point of defense, he had sold to Monro, and therefore did not want, but still kept about him on his premises? The law of self-defense and defense of property are out of the case; and the dog comes to be an idle nuisance. He is neither chained, nor is any effort made to restrain his attacks upon the

1. 2 Marsh. 577.

neighbors. So far from it, a regret is expressed that he had not eaten them up. Here is no criminal wrong-doer entering for the purpose of committing felony or a breach of the peace; no entry into a dwelling or inclosed yard: *Burrough, J.*, 7 Taunt. 497, 498; but the mildest of all technical trespasses, done not secretly, but openly, in company with a number of others. Any person might have killed such a fierce dog kept loose, his vicious disposition being known to the man who kept him: *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351 [15 Am. Dec. 383]. He comes within the rule that every man may abate a public nuisance: *Bowers v. Fitzrandolph*, Add. 315. In *Smith v. Pelah*, 2 Stra. 1264, Lee, C. J., "ruled that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes: for it was owing to his not hanging the dog on the first notice. And the safety of the king's subjects ought not afterwards to be endangered." Hanging is put only by way of example; but in some way such an animal must be properly secured from doing mischief: *Jones v. Perry*, 2 Esp. 482; S. C., Norris' Peake, 487. This case of *Jones v. Perry*, was by the father for an injury to his son; and the report in Peake says the child first irritated the dog. He was tied, but by so long a string that he could reach the curbstone on the opposite side of the street. And see *Blackman v. Simmons*, 3 Car. & P. 138.

In short, a man must be governed in these things, even as against trespassers, by the nature and object of the article which is kept upon his premises. The business of life must go forward, and the fruits of industry must be protected. A man's gravel-pit is fallen into by trespassing cattle, his corn eaten, or his sap drunk, whereby the cattle are killed; his unruly bull gores the intruder, or his trusty watch-dog, properly and honestly kept for protection, worries the unseasonable trespasser. Such consequences can not be absolutely avoided. Yet so long as he keeps upon the side of humanity, there is little danger that a jury of his neighbors will not place a correct construction upon his acts. With them it must lie, in nice cases, to mark the boundaries of his conduct. In the case before us, we think the defendant below transgressed the plainest outlines of his duty. He put his neighbors in danger, without the semblance of benefit to himself.

The judgment against him must be affirmed.

A Dog so FEROCIOUS that he will of his own disposition bite mankind on the street, is, if at large, a nuisance, and may be killed by any one: *Dunlap v. Snyder*, 17 Barb. 566. One who knowingly and wrongly suffers a ferocious and vicious dog to go freely about his grounds, and to inflict an injury, is responsible, though the person injured was guilty of some negligence: *Lynch v. McNally*, 7 Daly, 132; *Buckley v. Leonard*, 4 Denio, 501. When an act dangerous to human life is done, precautions should be taken to avoid injury, and notice should be given to warn persons of the presence of danger: *Althof v. Wolf*, 2 Hilt. 356. "A man may keep a dog for the necessary defense of his house, or use other lawful means for the protection of his person or property, but if the dog is fierce and dangerous, or if he negligently set a spring-gun on his premises, and a trespasser is injured, the latter may recover, as the case may be, against the owner of the one or the person who set the other:" *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 136. In all the foregoing, the principal case is cited as authority. In *Kelly v. Tilton*, 3 Keyes, 270, the principal case is said to maintain the proposition that a dog known to be dangerous, and accustomed to bite mankind, might be kept at night to protect property against felons; but upon this point the weight of the authorities is said to be the other way, and to hold that such an animal is a nuisance.

For cases in this series upon liability for injuries committed by animals, see *Angus v. Radin*, 8 Am. Dec. 626; *Hinckley v. Emerson*, 15 Id. 383.

VAN STEENBURGH AND GRAY v. TOBIAS.

[17 WENDELL, 562.]

JOINT ACTION AGAINST SEPARATE OWNERS OF ANIMALS can not be sustained for damages inflicted by the joint act of such animals.

CASE by Tobias against Van Steenburgh and Gray for damages inflicted by their dogs in worrying sheep. The dogs were not partnership or joint property, but one belonged exclusively to Gray and the other to Van Steenburgh. Nonsuit granted by the justice, because a joint action was not maintainable. Judgment reversed by the common pleas, from which judgment of reversal Van Steenburgh and Gray prosecuted this writ of error.

J. Wilcoxson and D. Van Schaack, for the plaintiffs in error.

A. Vanderpool and W. H. Tobey, for the defendant in error.

By Court, COWEN, J. The suit before the justice was against two persons for a joint trespass or wrong; and the plaintiff proved a separate trespass or wrong against each. It does not follow, because the animal of A. accompanies the animal of B., in the same mischief, that the owners are jointly liable. Where a joint action will lie, either may be made accountable for the whole injury. In a case like the one before us, the dog of one may be young, feeble, and incapable of mischief by himself;

and yet, if a joint action lay, his master might be made accountable for the injury caused by the large and ferocious dog of his neighbor. The reason which makes one liable who personally joins in, or aids or abets the wrong done by another, does not apply. That is a case of intention or volition in the offender; and the man who advises or countenances a trespass is the real cause. He is sometimes the greater wrong-doer of the two; and at any rate, the law will not allow one who is perhaps alone able to pay, to shield himself under the plea that the wrong was done wholly or in part by the other. This is the same principle which inculcates the rioter or conspirator; and makes him, though absent, a party to all that the actual perpetrator may say or do. In this there is great formal fitness and propriety; for there is actual delinquency.

Not so in the case of animals which happen to unite in perpetrating mischief. An ox and a calf belonging to different owners, reaching through a fence, throw it down and enter the inclosure of another at the same time; it would be unjust that the owner of the small animal should be holden to pay the damage done by the larger; and yet he must do so if a joint action could be sustained against both owners. The difficulty in accurately estimating the separate injury done by each dog, is not an argument of sufficient strength to warrant the injustice of punishing a man who is entirely innocent. The jury must, in this, as in most cases of wrong, get at the real damages in the best way they can. *Russell v. Tomlinson and Hawkins*, 2 Conn. 206, was a case precisely, both in fact and principle, similar to the present, except that it was a technical action of trespass, averring that the defendants entered upon the plaintiff's land, and with their dogs worried and killed the plaintiff's sheep. Swift, C. J., said: "Owners are responsible for the mischief done by their dogs; but no man can be liable for the mischief done by the dog of another, unless he had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining in doing mischief, could make the owners jointly liable. This would be giving them a power of agency, which no animal was ever supposed to possess." Gould, J., labored mainly to prove that such a principle applied as well in an action of trespass under the statute of Connecticut, as in an action on the case. He puts the question of

joinder on common law grounds. He also goes more at large than the chief justice into the objection that the damages could not be severed. The court were unanimous that a joint action would not lie. *Adams v. Hall and Cootwire*, 2 Vt. 9 [19 Am. Dec. 690], was an exactly similar attempt to charge the several owners of dogs jointly, and held the same way. This case appears to have been very well examined both upon principle and authority.

I am inclined to think that on moving for a nonsuit before the justice, the only way to save the plaintiff from that consequence was, by his electing to proceed against one of the defendants solely for the separate damage done by his dog; and entering a *nolle prosequi* as to the other, or as to him consenting to a verdict of not guilty. That would have subjected the plaintiff to a judgment for costs in favor of the acquitted defendant; but being on a technical formal point, clear of the merits, would not probably, as to him, have been a bar to a subsequent separate action, any more than a nonsuit would have been a bar.

Judgment of the common pleas reversed, and judgment of the justice affirmed.

The principal case is cited approvingly in support of the following propositions: One is not liable for damage done by other animals jointly with his own, but for such injury only as is shown to have been inflicted by his own property: *Partenheimer v. Van Order*, 20 Barb. 480; *Harden v. Boyce*, 59 Id. 425; *Colegrove v. Harlem & N. H. R. R. Co.*, 6 Duer, 407; *Chipman v. Palmer*, 9 Hun, 520; *Slater v. Mersereau*, 64 N. Y. 147. A joint action will not lie against the several owners of animals which jointly damage the property of others: *Carroll v. Weiler*, 4 N. Y. S. C. 132. Smart money can not be allowed against one because he owns a dog which has killed sheep: *Auchmuty v. Ham*, 1 Denio, 501. The principal case is in accord with *Adams v. Hall*, 19 Am. Dec. 690, and the cases referred to in the note thereto.

CASES
IN THE
COURT FOR THE CORRECTION OF
ERRORS
OF
NEW YORK.

BLOODGOOD v. MOHAWK AND HUDSON R. R. Co.

[18 WENDELL, 9.]

PUBLIC USE—RAILROADS.—The legislature may authorize private property to be taken for the use of a railroad, upon the payment of just compensation.

RIGHT OF EMINENT DOMAIN MAY BE EXERCISED by the government directly, as through the acts of its officers, or indirectly, as through corporations or private individuals.

AMOUNT OF COMPENSATION NEED NOT BE ASCERTAINED and paid before private property can be appropriated to a public use, if a certain and adequate remedy is provided by which such compensation can be obtained without unreasonable delay. But the legislature can not authorize such appropriation where no remedy exists by which the owner can procure compensation.

TO JUSTIFY AN ENTRY UPON LAND and the construction of a railroad thereon, the defendants must plead that the damages were regularly assessed and paid before they proceeded to appropriate the land to the alleged public use.

WHEN A STATUTE PROVIDES THAT COMPENSATION shall be paid for lands appropriated to a public use, without designating the time of payment, it must be so construed as to make the payment a condition precedent to the appropriation.

PLEADING STATUTE HAVING AN EXCEPTION.—Party who would bring himself within an exception must plead it; but if the exception forms no part of his cause of action, but merely an excuse for his adversary, the latter must plead it. *Per* Senator Edwards.

THE POLITICAL POWER OF THE ENGLISH PARLIAMENT is unlimited. In this respect it greatly differs from our state and national legislatures, which are controlled by written constitutions. *Per* Senator Maison.

JUST COMPENSATION means a fair equivalent in money. It must be paid when the property is taken, or within a reasonable time thereafter; and its

payment must not depend on any hazard or uncertainty. *Per* Senator Maison.

COMPENSATION FOR LANDS TAKEN FOR A PUBLIC USE may be assessed by commissioners. The persons whose lands are taken are not entitled to an assessment by a jury. *Per* Senator Maison.

THAT CONSTRUCTION OF A STATUTE SHOULD BE PREFERRED which best harmonizes it with the constitution.

RIGHTFUL ATTRIBUTES OF SOVEREIGNTY with respect to private property considered by Senator Tracy.

PUBLIC USE, and the agencies through which the power of eminent domain may be constitutionally exercised, considered by Senator Tracy.

TRESPASS *q. c. f.*, by plaintiff. The defendants justified under their act of incorporation: Stat. N. Y., 1826, p. 286, etc. The seventh section of this statute provides as follows: "That the said corporation be and they are hereby authorized by their agents, surveyors, and engineers, to cause such examinations and surveys to be made of the ground lying between the Mohawk and Hudson rivers within the aforesaid limits prescribed by the first section of this act, as shall be necessary to determine the most advantageous route, place or places for the proper line, course, road, and way, whereon to construct their single or double railroad or ways; and it shall be lawful for the said corporation to enter upon, and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double railroad or ways, and the accommodations requisite and appertaining to them; and may also receive, hold, and take all such voluntary grants and donations of land and real estate, as shall be made to the said corporation to aid in the construction, maintenance, and accommodation of their single or double railroad or way: Provided, that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation of the owner or owners of the same, at a price to be mutually agreed upon betwixt them; and in case of a disagreement of the price, it shall be the duty of the governor of this state, upon a notice to be given him by the said corporation, to appoint three commissioners, etc., of whom one at least shall be a resident of the county of Albany, and one of the county of Schenectady, who shall be persons not interested in the matters to be determined by them, to determine the damages which the owner or owners of the land or real estate so entered upon by the said corporation, has or have sustained by the occupation of the same, and upon payment of such damages, to-

gether with the costs and charges attending the appraisement by the said corporation, the said commissioners being allowed three dollars each per day whilst thus employed; or upon the said corporation depositing in any bank in the city of Albany, the amount of such damages, together with the costs and charges aforesaid, to the credit of the person or persons to whom the commissioners may have awarded them, the proper officers of such bank giving notice to such person or persons, by letter, of such deposit being made by the said corporation; then the said corporation shall be deemed to be seised and possessed of the fee simple of all such land or real estate, as shall have been appraised by the said commissioners." The defendant pleaded an entry for the purpose of making examinations and surveys, and of using and taking possession of so much of the land, earth, etc., as might be necessary to construct and maintain their railway, etc. Plaintiff demurred to the plea, and the demurrer was overruled, and judgment given for defendants. Writ of error was sued out.

S. Stevens, for the plaintiff in error.

B. F. Butler, attorney-general of the United States, for the defendants in error.

WALWORTH, Chancellor. The first and most important question in this case is, as to the constitutional power of the legislature to authorize the taking of private property for the use of a railroad, upon paying a just compensation to the owner for the property thus taken. In the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 45 [22 Am. Dec. 679], which came before me in another court, I decided that railroads for the conveyance of travelers, or the transportation of merchandise from one part of the state to another, were public improvements and for the public benefit, for the construction of which private property might be taken under the authority of the legislature, upon paying a just compensation therefor to the owners. That the eminent domain, or the right to resume the possession of private property for the public use, upon paying a just compensation therefor, remained in the government or the people in their sovereign capacity; and that such right of resumption might be exercised, not only for the public safety, but also where the interest or even the convenience of the state or of its inhabitants was concerned, as for the purpose of making turnpike and other roads, railways, canals, ferries, and bridges for the accommodation of the public.

That it belonged to the legislative power of the state to determine whether the benefit which the public were to derive from such improvements, were of sufficient importance to justify the exercise of this right of eminent domain, in thus interfering with the private rights of individuals; and that the right itself might be exercised by the government through its immediate officers or agents, or indirectly through the medium of corporate bodies or private individuals. The reasons upon which these conclusions were founded, are stated at length in the report of that case, and it is therefore unnecessary to repeat them here. In the subsequent case of *Varick v. Smith and the attorney-general*, 5 Id. 137 [28 Am. Dec. 417], I also arrived at the conclusion that this right of eminent domain did not authorize the government to take the property of one citizen for the mere purpose of transferring it to another, even for a full compensation, where the public was not interested in such transfer; and that such an arbitrary exercise of power would be an infringement of the spirit of the constitution, as not being within the powers delegated by the people to the legislature. To justify the exercise of the right, there must be a necessity, or at least an evident utility on the part of the public: Ersk. Inst., b. 2. tit. 1, sec. 2; *per* Lane, J., 4 Ohio, 286;¹ *per* Green, J., 3 Yerg. 52.²

Upon a further argument and examination of this subject, I have seen no reason to change the opinion I had expressed in the cases above referred to. On the contrary, since the decision in the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, decisions have been made in the courts of some of our sister states, which have tended to confirm my views of this constitutional question. In the case of *Cottrill v. Myrick*, which came before the supreme court of Maine in 1835, 3 Fairf. 222, it was claimed that the property, an alleged private right of fishery, which had been opened and improved for the benefit of the inhabitants farther up the stream, was not taken for public use, because the profits and emoluments of the improved fishery were granted to the inhabitants of two particular towns; but the court, in answer to this objection, said: "The public had an interest in the preservation and regulation of the fishery, and in the removal of obstructions by which it might be impaired or destroyed. This was best effected through the agency of persons appointed by the neighboring towns, and by quickening and rewarding their diligence by a grant of the profits.

1. *Cooper v. Williams*; S. C., 22 Am. Dec. 745.

2. *Harding v. Goodlett*; S. C., 24 Am. Dec. 546.

It is a course of proceeding adopted by the legislature in many other cases, the authority of which has not been questioned. If public purposes and uses were to be promoted, as they undoubtedly were in the case before us, it was no objection to the power of appropriation by the legislature that it contributed also to the emolument or advantage of individuals or corporations. Many cases of this character exist, in which the legislative power is well established." And the court refers to the case of the right granted by statute in that state and in Massachusetts to the owners of mills to raise a head of water necessary for their operation, although the lands of others are thereby injured and rendered unproductive, ample provision having been made by law for compensating the owners of such lands for the injuries which they may sustain. A similar decision upon this constitutional question was made by the supreme court of Alabama in 1835, in the case of *Dyer v. The Tuscaloosa Bridge Company*, 2 Port. 296 [27 Am. Dec. 655], where a corporation was authorized by the legislature to take private property for the site of a bridge, and to make a passage to the same. A similar power has been exercised by the legislature of this state for the last fifty years in relation to turnpike roads, toll bridges, etc., without question, and also by the legislature of nearly every state in the union.

In the case of *Harding v. Goodlett*, 3 Yerg. 41 [24 Am. Dec. 546], to which this court were referred on the argument, which came before the supreme court of Tennessee in 1832, it was held that the law of that state authorizing the taking of the land of an individual for the erection of a grist-mill thereon, at which all the inhabitants of the neighborhood should be entitled to have their grinding done in turn, and at fixed rates, was such a public use as to authorize the exercise of the right of eminent domain, although the whole property and profits of the mill were to belong to the individual proprietor thereof. It is true, in that case, each individual could not be permitted to go to the mill and grind his own grist, but still it was the public utility of having such a mill, where each individual had an equal right to be served, which authorized the taking of the private property for such a purpose, upon payment of a full compensation for the same. So in the case of a ferry or railroad, although each member of the community can not cross the river in his own ferry-boat, or ride upon the railway in his own car, or travel thereon with his own locomotive engine, he has an unquestionable right to cross the ferry in the usual way,

or to travel on the railway in the accustomed mode of traveling thereon, paying the ordinary toll or fare; and the proprietors of the ferry or the railway would be liable to an action for damages if they refused, without sufficient cause, to permit him to exercise this right. It might as well be objected that a canal, made by an incorporated company, was not a public improvement, because each individual could not navigate it with a canal boat, or travel thereon with a steam engine; or that a turnpike road was of no public utility, because each citizen could not conveniently transport produce and passengers thereon with his wagon and horses. I have no doubt, therefore, of the constitutional power of the legislature to take private property for the purpose of making a railroad, or any other public improvement of the like nature, upon paying a just compensation for such property, whether such public improvement is made by the agents of the state, or through the medium of a corporation or joint stock company. But the exercise of the power to take private property, even for uses which are confessedly public, should not be resorted to in any case, unless the benefit which is to result to the public is of paramount importance in comparison with the individual loss or inconvenience, and an ample and certain provision should always be made for a full and adequate compensation to the individual whose property is thus taken; and that legislator will best discharge his duty who exercises this power as seldom as possible, consistently with the real interests and general welfare of the state.

Another very important question which arises in this case is, whether the legislature in fact authorized the defendants to enter upon the private property of the plaintiff and to construct their railroad thereon before his damages were actually assessed and paid, or offered to be paid to him; and if such is the construction of the law, whether such a power is authorized by the constitution. In the case of *Rogers v. Bradshaw*, 20 Johns. 735, this court decided that where private property was taken for public use it was not necessary that the amount of the compensation should be actually ascertained and paid before such property was appropriated to the public use; that it was sufficient if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay. This decision has been followed by the courts of several of our sister states. To this extent the opinion of Chancellor Kent, in the case of *Rogers v. Bradshaw*, must be considered as the settled construction of the constitu-

tional provision on this subject, at least in this state. I can not, however, agree with my learned predecessor in his subsequent reasoning in that case, upon which he afterwards acted in the case of *Jerome v. Ross*, 7 Johns. Ch. 344 [11 Am. Dec. 484], that it is not necessary to the validity of a statute authorizing private property to be taken for the public use that a remedy for obtaining compensation by the owner should be provided. On the contrary, I hold that before the legislature can authorize the agents of the state and others to enter upon and occupy, or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. I do not mean to be understood that the legislature may not authorize a mere entry upon the land of another for the purpose of examination, or of making preliminary surveys, etc., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property if it should afterwards be taken for the public use. But it certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so.

In the ordinary case of lands taken for the making of public highways, or for the use of the state canal, such a remedy is provided; and if the town, county, or state officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage

of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid. In the case under consideration, if this company were authorized to take possession of the plaintiff's property and complete the construction of their road before his damages were assessed and paid, or offered to be paid to him, he might have been wholly without redress, as he has no power to compel the assessment of damages, and no adequate fund was provided for the payment of the damages when ascertained. The citizen whose property is thus taken from him without his consent is not bound to trust to the solvency of an individual, or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts; especially those corporations which are authorized to incur heavy responsibilities in anticipation of the payment of their capital by the subscribers for the stock; and if the true construction of this charter was such as is contended for by the defendants' counsel, I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void.

I can not, however, agree with the learned judge who delivered the opinion of the supreme court in this case, that such is the fair and legitimate construction and meaning of the defendants' charter. It is a primary rule in the construction of statutes in those countries where the limits of the legislative power are restricted by the provisions of a written constitution, to endeavor if possible to interpret the language of the legislature in such a manner as to make it consistent with the constitution or fundamental law. Applying that principle to the statute under consideration, and having ascertained that it would be inconsistent with the fundamental law of the state, to authorize the defendants to take possession of the lands of an individual without having made an adequate and certain provision for the recovery of the damages which he would necessarily sustain by such permanent occupation of his property for the purposes of the road, there appears to be no difficulty in giving such a construction to this statute as will be consistent with the constitution and also with the probable intention of the legislature. This may be done effectually by considering what is very inartificially appended as a proviso to the seventh section, as in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and

take the permanent possession of the land for the use of the corporation. Indeed, such appears to me to be the more reasonable and fair construction of this section, independent of any constitutional difficulty in the way of a different construction. For upon the supposition that no injustice was intended by the legislature, it can hardly be presumed they meant to authorize the company to enter upon the lands of individuals, pull down their buildings, etc., and then take their own time to get the damages appraised and to pay the same; leaving the individuals injured thereby to seek for some uncertain remedy by action, if the company neglected to get the damages assessed within a reasonable time.

The conclusion at which I have arrived, therefore, is, that the defendants' plea is imperfect in not averring that the damages had been regularly assessed and paid before the defendants entered upon the plaintiff's land and appropriated it to the use of the road; and that if they in fact entered and commenced the construction of the road before the damages were actually assessed and paid, the plaintiff has a technical right to recover in this action for all damages which he really sustained by such unauthorized entry, although these requisites of the statute were afterwards complied with. In that case the defense arising from the subsequent assessment and payment of the damages, can only be pleaded to that part of the declaration which charges a continuance of the trespass after the damages were assessed and paid as required by the statute.

For these reasons I think the demurrer is well taken, and that the judgment of the supreme court should be reversed; with liberty to the defendants to amend their plea upon the payment of costs in this court and of the demurrer in the supreme court.

By EDWARDS, Senator. The important questions which appear to me to be presented in this case for examination, are, first, whether the act is constitutional under which the defendants attempt to justify? If not, no plea however well pleaded could justify the trespass. And secondly, if the act is constitutional, was the plea correctly pleaded?

The principal objection, in my opinion, urged against the constitutionality of the act is, that the property was taken for a use not authorized by the constitution. The constitution authorizes private property to be taken for public use, on allowing the owner a just compensation.

Let us inquire, then, whether the act incorporating this company authorized it to take the property of the plaintiff for public use. The use for which it was taken is declared in the act. The company were authorized by the act to take it for the purpose of constructing a single or double railroad or way, between the Mohawk and Hudson rivers, etc., to transport, take, and carry property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the company might choose to employ. Does the fact that the power to construct the road is given to a company alter the nature of the grant? Surely not. It is entirely immaterial who constructs the road, or who defrays the expense of the construction. The object for which it is constructed must determine the nature of the grant, whether for public or private use. What object had the legislature in view in authorizing this company to construct the road in question over the plaintiff's land? It was not the private emolument the company was to receive for the use of the road. For such a purpose the right would never have been conferred. The legislature, who are constituted the judges of the expediency of taking private property for public use, came to the conclusion that the public required the use of a railroad between the cities of Albany and Schenectady. It deemed it inexpedient to construct it at the public expense, and adopted the policy of having a company construct it at its own expense and risk, having the money expended refunded by way of tolls or fare from the individuals who should travel upon it; reserving the right, however, to take it as the property of the state within a certain period. Because the legislature permitted the company to remunerate itself for the expense of constructing the road, from those who should travel upon it, its private character is not established; it does not destroy the public nature of the road, or convert it from a public to a private use. If such would be the effect in relation to railroads, the receipt of tolls for the use of turnpike roads would also determine the question that they too were for private instead of public use. The public have an interest in the use of these roads; any individual has a right to be transported upon them, at all reasonable times, on paying the usual fare, as much as he has the right of using a turnpike or a ferry on paying the usual toll.

In the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 75 [22 Am. Dec. 679], the chancellor says: "The privilege of making a road and taking tolls thereon,

is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The public have an interest in the use of the road, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual or his property, without any reasonable excuse, on being paid the usual rate of fare." If it is a public franchise, and granted to the company for the purpose of providing a mode of public conveyance, the company in accepting it, engages on its part to use it in such manner as will accomplish the object for which the legislature designed it. While the company, therefore, holds the property of individuals which it is authorized by the act to hold and use, it can not convert it from the original design of the legislature by refusing to transport passengers and their property; a departure from that design in the use, would work a forfeiture of their privileges; and the legislature, from the nature of the grant, would have a right to interfere even had no such power been reserved in the act of incorporation; but the power to alter, amend, or modify, was reserved in express terms in the act. The legislature, therefore, has the control over it, and may direct the management and use of the road in such manner as will best subserve the public interest.

A difference in principle has often been attempted to be established between those acts of the legislature which authorize companies to take private property for the construction of railroads, and those which authorize it to be taken for the maintenance of ferries, the erection of bridges, and the construction of turnpike roads; but from the best reflection I have been able to give the subject, I have been unable to discover any such difference in principle. In the use of railroads the company furnish the cars and receive the fare for the transportation of passengers and their property; so in the use of ferries, the company furnishes the boat and receives the fare for the like services. The latter have been considered and treated as public franchises from the earliest grants; why, therefore, should not the former? I admit, that in the use of bridges and turnpikes, there is more latitude given to the individual who wishes to transport his person or his property, as to the mode and manner in which it shall be done, than there is in the use of railroads or ferries. In the use of the former, he accomplishes his object by the aid of his own vehicle, and takes his own time to effect it; while in the latter, he and his property are to be transported in such vehicles as the companies provide. But the

mode does not alter the nature of the object; either method is to effect the same purpose, to wit, the transportation of the person and his property. The difference in the mode of accomplishing the object arises from the nature and necessity of the case. In the one case, safety and expedition render it necessary that the company should furnish the vehicle; in the other, the traveler may secure both of these objects by furnishing his own. In the one case it is practicable, in the other it is not, consistently with the safety of the traveler. It is not only necessary that railroad companies should provide the cars, and ferry companies the boats, to secure to the traveler safety and expedition, but it is so also as a matter of economy. The privileges therefore allowed these companies, to provide the vehicles for the accommodation of travelers, is a public benefit, and this is an additional fact to show their design for public use, rather than evidence in favor of a contrary inference.

I can not, therefore, realize any material difference in principle in these two classes of acts of incorporation; and it has been repeatedly held that the acts authorizing private property to be taken for the use of ferries, bridges, and turnpikes, are acts authorizing it to be taken for public use, although the individual companies to whom these privileges are granted receive the emoluments arising from the grants. In the case of *The Charles River Bridge Company v. The Warren Bridge Company*, 7 Pick. 496, Putnam, J., says, that "bridges and ferries are *publici juris*; a toll is granted for services rendered to the public;" and again he says, "the proprietors of a bridge or ferry are under great liabilities to the public, and compellable to permit the public to use them on paying toll." In the case of *The State v. The Town of Hampton*, 2 N. H. 25, Woodbury, J., says: "It has always been understood in this state, and all turnpike grants have been made on the hypothesis, that lands taken for turnpike roads are taken for public purposes." In the case of *Rogers and Magee v. Bradshaw*, 20 Johns. 742, Chancellor Kent, in delivering the opinion of the court, remarks that "turnpike roads are in point of fact the most public roads or highways that are known to exist, and in point of law, they are made entirely for public use, and the community have a deep interest in their construction and preservation." If the acts authorizing companies to take private property for the maintenance of ferries, the erection of toll bridges, and the construction of turnpikes, are acts authorizing it to be taken for public purposes, as it appears to me they most clearly are;

and if there is no material difference in principle between these acts and those incorporating railroad companies in this respect, reasoning from analogy, I feel myself constrained to come to the conclusion that the taking of private property for the construction of the railroad in question was the taking it for public purposes; and as the act made ample provision for the individual owners whose property was to be taken for this purpose, it appears to me it is strictly within the provisions of the constitution; and the only remaining question to be considered is, whether it was properly pleaded in justification of the trespass alleged?

Formerly much diversity of opinion seems to have existed as to the true rule of pleading statutes with provisos and exceptions. In the case of *Cathcart v. Hurdy*, 2 Mau. & Sel. 540, Lord Ellenborough, said: "The rule was inflexible; if there be a substantive proviso creating an exception, it was for the party who would bring himself within it to plead it." Bacon, however, declared the rule to be, that if there be in that clause of an act of parliament, which is pleaded, any proviso or exception, this must be recited, although it should make against the party reciting it; for as the proviso or exception is parcel of the clause which is pleaded, if this should be omitted, it would amount to a misrecital of the clause: 6 Bac. Abr., Statutes at Large, 395; but the rule which seems to have prevailed, and which has been adopted by our judicial tribunals, is the one with a single exception laid down by Treby, C. J., in the case of *Joes v. Axer*,¹ 1 Ld. Raym. 120. He says: "Where an exception is incorporated in the body of a clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to his adversary to show the proviso." In the case of *Teal v. Fonda*,² 4 Johns. 305, Mr. Justice Van Ness says the only error in this rule of Chief Justice Treby is, in restricting it to provisos contained in a subsequent section or statute which was not warranted by the cases; and in the case of *Hart v. Cleis*, 8 Johns. 48, the court say: "If the exception or proviso forms no part of the plaintiff's title or right of action, but merely a matter of excuse for the defendant, it need not be pleaded, but left to the opposite party." I think, therefore, we may fairly infer from the authorities, that it is immaterial whether the proviso or exception is in the same clause or a

1. *Joes v. Axer*.

2. *Teal v. Fonda*.

subsequent one; if the proviso or exception is necessary to give the party pleading the clause the right he claims under it, he must plead it. If, on the other hand, the proviso or exception forms no part of such right, but merely a matter of excuse for the opposite party, he need not plead it, but may leave it to the party who is to avail himself of the benefit of it.

The defendants in this plea set out substantially the part of the clause authorizing them to enter and take the plaintiff's property for the construction of their road, without setting out the proviso; and in order to determine whether it was necessary for them to set out the proviso, it becomes necessary to consider its nature and character. The proviso prescribes the condition on which the property of individuals is to be taken from them and converted to public use. It is a condition required by the constitution, and without which the property can not be taken for the purposes contemplated by the act; it therefore constitutes an essential part of the clause to show the very existence of the right the parties claim under it. The plea treats the act in the same manner it would, had it not contained the proviso. Suppose the act had been passed, authorizing the company to enter upon and take possession of and use all such lands and real estate as might be indispensable for the construction and maintenance of their road, without requiring the company to pay a compensation to the individuals whose property should be taken, could the company justify the taking of the property under it? Would not such an act be in direct violation of the constitution, and absolutely void? It appears to me it would, beyond all doubt, and that such an act, however well pleaded, could form no justification for the trespass alleged. But it was said by the defendants' counsel that this proviso formed a condition subsequent, and therefore it was unnecessary for the defendants to plead it, to justify their entering and taking the plaintiff's property for the construction of their road; and the supreme court seem to have entertained the same views with respect to the construction of this statute, for they say: "The purchase of the land on the payment of the appraised damages is a condition precedent to the vesting of the fee simple of the land required for the road in the corporation, but not to their right to enter upon and take possession of and use it for the construction of their road."

If the payment of damages was only a condition precedent to vesting the fee of the land, and not to taking possession and using the land for the construction of the road, then it is obvi-

ous the proviso does not require the defendants to pay damages for the use of the land for the construction of the road or for its continuance: for if the payment of damages is a condition precedent only to the vesting of the fee, and not to the construction and continuance of the road, the company may never desire the fee; it is wholly unnecessary for the purpose of their road; all they require is the use of the land during the time of their grant, and the individual who has lost the use of his property during that period, and if it consist in buildings which have been destroyed, has lost it forever, is without the means of redress, because the company do not desire to become seised in fee of the land they occupy. If such be the true construction of the act, or if the act does not require the company, on taking possession of the land and constructing the road (I will not say in making the necessary surveys to determine the route), but on converting it from a private to a public use, then am I prepared to say that in my judgment it is in violation of the constitution and void, and of course could form no justification for the trespass alleged. The constitution declares that private property shall not be taken for public use without a just compensation. When is the compensation to be made? Clearly, on the taking of the property; for it declares it shall not be taken without a just compensation. It is to be simultaneous with the act of taking the property, that is, depriving the owner of the use and benefit of it, and appropriating it to public use. This appears to me to be the fair and rational construction of this clause of the constitution; the framers of it could not have designed that the private property of individuals, which, in some instances, might constitute their whole means of subsistence, should be taken upon credit. Adopt the contrary construction, and it enables the company who may be authorized to take the property, to deprive the individual in some instances of his whole estate for a time at least; and if the company finally prove insolvent, a total loss would ensue. Could the framers of the constitution ever have intended to arrest from individuals, by the strong arm of government, their property, and compel them to rely upon the precarious and uncertain responsibility of railroad companies? I can not for a moment believe it. The power of taking private property for public purposes is at best an arbitrary power, and justified only by the law of necessity, and therefore should never be exercised without rendering promptly a just equivalent to the individual sufferer.

I am aware that under the statutes authorizing the construction of canals, the commissioners are authorized to take private property; and that the damages are afterwards to be appraised and paid for by the state; and that the right of the commissioners to enter upon and take the property of individuals before the state compensates the owner, has been sanctioned by the judicial decisions of this state: See *Rogers and Magee v. Bradshaw*, 20 Johns. 744; *Jerome v. Ross*, 7 Johns. Ch. 343 [11 Am. Dec. 484]; *Wheelock v. Pratt*, 4 Wend. 650. And although I am decidedly of the opinion that the construction given to the constitution under these decisions is a forced construction, and one which was pressed upon the court from the extreme necessity of the case, I do not feel disposed to controvert them, nor is it necessary to do so for the purpose of coming to the conclusion I have arrived at, in the case under review. The strong reason why a strict and rigid compliance with the terms of the constitution has not been required, where private property has been taken for the construction of canals, is, from the undoubted responsibility of the state to compensate the owner. When legal provisions have been made for payment by the state, it has been deemed ready pay, or an equivalent. But this reason can not exist in its full force when applied to incorporated companies. They are often irresponsible, and no such general rule can be established as applicable to them, without greatly hazarding the property of the individual. I am decidedly of the opinion, therefore, that no such construction can with propriety be given to the constitution when applied to them; and if the act admits of such a construction, and such only, then is it unconstitutional and void, and could furnish no protection to the defendants, even had they set out the proviso, unless they had averred that they had satisfied the damages, or that they were ready and willing to make satisfaction.

But I have before come to the conclusion that this act is constitutional, and I do not, therefore, give it the construction which it received from the supreme court. I can not believe it was the intention of the legislature that the defendants should be permitted to take possession and use the land of individuals for the construction and maintenance of the road, and afterwards pay the damages only as a condition of becoming seised and vested of the fee. They intended that the individual whose property was taken should be paid his damages; and although the fee was to vest on the payment of the damages, yet it was not for the fee the damages were to be paid, but for the

occupancy, for the purpose of building and maintaining the road during the period of the grant. Not that this occupancy was to precede the assessment, but the commissioners are to anticipate what the damages would be for the occupancy of these lands for the use and maintenance of the road during that period. If, however, occupancy should precede assessment, it does not follow, that it should be such an occupancy as would be necessary to construct the road; a mere location of the track, without breaking the ground, would be an occupancy.

From the view, therefore, I have taken of this case, I feel myself bound to come to the conclusion that the proviso in the clause granting the right of entry was an inseparable part of it, and essential to its very existence; that without it the act would be imperfect, and form no ground on which the defendants could justify; and that in order to justify, they were bound to set out the proviso as well as the enacting clause which preceded it; and not having done so, their plea is insufficient, and the demurrer is well taken. I am, therefore, for reversing the judgment of the supreme court, with leave to the defendants to amend their plea on payment of costs.

By MAISON, Senator. The question presented in this case is, whether the defendants have shown enough in their plea to justify themselves in taking possession of, and using the plaintiff's property, in the manner they in their plea have admitted; and this involves the consideration whether the act of the legislature of this state, as far as set forth in the plea, is or can be deemed a constitutional law; for if it be unconstitutional, then clearly the defendants must fail in the justification, which they have set forth in their plea, and the demurrant must prevail.

Our states and union are governed by written constitutions, the provisions of which are framed with the most studied caution, and designed to relieve the people from an uncontrollable despotic power, under which they had lived, and to interpose barriers to the exercise of that power, to the preservation of their lives, liberty, and property, which they saw and knew were so eminently endangered while subjected to the caprice of a parliament, whose political power was omnipotent, unregulated, and uncontrolled by any written constitution. We read from Blackstone's Commentaries, vol. 1, p. 160, that "the power and jurisdiction of parliament [says Sir Edward Coke] is so transcendent and absolute, that it can not be confined, either for causes or persons, within any bounds; and of this high

court he adds, it may be truly said, *si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima*. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. This being the place where that absolute, despotic power, which must, in all governments, reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession of the crown, as was done in the reigns of Henry VIII. and William III. It can alter and establish the religion of the land, as was done in a variety of instances in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom, and of parliaments themselves; as was done by the act of union and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore, some have not scrupled to call its power by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority on earth can undo."

Under our state and federal institutions, the powers of the general and state governments are clearly defined and well understood. The government of the United States is a government of delegated power, and it can exercise none other than that which is clearly and distinctly given; to it the people have literally said, "Thus far shalt thou go and no farther." To guard against the right of assuming or exercising, by inference, any powers besides those delegated, provision was made in the tenth article in amendment of that constitution, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people;" and delegated powers are so far restricted in their exercise, that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." The constitution of this state is not a constitution delegating power, but a constitution regulating and restraining power. The legislature of our state, composed of the representatives of the sovereign power, have the right to exercise

sovereign power; and it is the same in degree as the English parliament, except so far as it is restrained by the constitution itself, and the constitution of the United States. In our constitution is introduced the same restraint upon the exercise of absolute power, to wit: "No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." Without these restraints upon legislative power, private property, without compensation, could be taken for the public use, as in England and in South Carolina, where no such restraints exist: *The Governor etc. of the Cast Plate Manufacturing Co. v. Meredith*, 4 T. R. 794; *Sturke v. McGowan*,¹ 1 Nott & M. (S. C.) 387. And it is with great regret I notice this case in South Carolina, as existing in a free republican country, where the enjoyment of private property should always be held sacred and inviolable, except in urgent, pressing necessity, in regard to public health, public defense, or public uses. Even in England, where no restraints exist, to their honor be it spoken, and in high commendation of their regard for private right, they have not outraged public justice by taking from the citizen his property for public use without compensation. If any case could there have occurred, which would have justified the exercise of such despotic power, the public sense would not have been offended had the government exercised it towards the proprietors of the Isle of Man. "The distinct jurisdiction of this little subordinate royalty," says Blackstone, 1 Com. 107, "being found inconvenient for the purposes of public justice and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers), authority was given to the treasury, by statute 12 Geo. I., c. 28, to purchase the interest of the then proprietors, for the use of the crown; which purchase was at length completed in the year 1765, and confirmed by statute 5 Geo. III., c. 26, 38, whereby the whole island and all its dependencies, so granted as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of bishoprics and other ecclesiastical benefices), are unalienably vested in the crown and subjected to the regulations of the British excise and customs."

Fortunately, in the case under consideration, the legislature of this state are not obnoxious to the imputation of usurping despotic power in violation of the constitution, by the grant which they have made to the defendants in error, authorizing

1. *Stark v. McGowan*.

the construction of their railroad, to take private property for public use without rendering compensation, as the plea which they have interposed to the plaintiff's declaration would seem to indicate. That plea insists, that the defendants stand justified of the trespass, because the legislature of this state has given them a right to enter upon, take possession of, and use the plaintiff's land for the purposes of their road, without alleging in that plea, as they should have done, that they had made to the plaintiff in error a compensation for the land thus used. I have therefore no hesitation in declaring, that any statute to the extent only as set forth in this plea, would be unconstitutional and void, and would consequently afford no justification for the trespasses charged. In coming to this conclusion, I have anticipated the decision of another question raised in this case, to wit, whether it was incumbent on the defendants to set forth in their plea, that they had made to the plaintiff compensation for his lands, or whether this was matter for the plaintiff to reply. On this branch of the case we have heard much of exceptions and provisos in statutes, and what their legal effects are when found in the enacting clause, and when in a subsequent section. It is unnecessary to pass in review the great number and variety of cases, which have been cited to us on this point, as they are all resolvable into a very plain and simple proposition, and that is, that a party in pleading must make out his case, clearly and distinctly; showing a state of facts which, if true, would entitle him to judgment.

Testing this plea by this rule, it is evident that the plea is defective, in that it reposes upon a void and unconstitutional law (I mean if the law be only to the extent as set forth in the plea, and only so far can we regard it in this case), for a justification, which is no justification, and upon which no judgment could be rendered for the defendants. The fact of having made compensation for the land taken, is indispensable to a perfect justification; it is a fact intimately connected with the defendants' case, and indeed the vitally important fact to be alleged, without which the plea can not be sustained, unless we can sanction the constitutionality of a law authorizing the taking of private property for public use without compensation. The act incorporating the defendants is declared, in the twentieth section, to be a public act, and although the courts will, *ex officio*, take notice of a public act, without its being stated in the pleadings, yet it is incumbent on the party to state all the facts necessary to bring his case within the protection afforded

by the statute: See *Bennet v. Hurd*, 3 Johns. 438; *Teel v. Fonda*, 4 Id. 306; *Hart v. Clies*, 8 Id. 43.¹ The fact of compensation having been made, is a link in the chain of a perfect defense, and as we can not presume that payment has been made, it is necessary for the party in his pleading to allege it. The plaintiff can not be called upon to reply to the defendants' plea, unless that plea make out a perfect defense. Can it with any reason be pretended, that the plaintiff should be held to reply that the defendants had not made him compensation for the lands taken? This would cast upon the plaintiff the burden of proving a negative. How could he prove that the defendants had never paid him? and yet how perfectly within the power of the defendants to prove payment, if payment had actually been made. It is only necessary to state the proposition, that its palpable absurdity may be seen.

I have thus far remarked upon the plea without any particular reference to the provisions of the act under which the defendants seek to justify. Let us examine that act, with a view of ascertaining the correctness of the conclusions to which I have arrived. We are not to presume that the legislature intended to deprive the plaintiff of his lands without compensation; and we are bound to give such construction to this section as will carry out the intention of the legislature, without infringing upon or violating the provisions of the constitution. Their enactments are to be intended to be made in subordination to, and not in violation of that instrument. What, then, did the legislature understand, and what do we understand by the expression "nor shall private property be taken for public use," and what did they, and should we understand by the expression "without just compensation"? The entering upon land and making the necessary surveys and examinations thereof, for the purpose of determining the most advantageous route, place or places, for the proper line, course, road, and way, whereon to construct the single or double railroad or way, is not, in ordinary acceptation or legal contemplation, the taking of land; there is no exercise of conclusive control or authority over the soil. A mere passing over for the purpose of examining and surveying the most feasible route for the road, and of the lands necessary to be taken, on which to construct the road, can not be said to be taking the land thus examined and surveyed. But when the examinations and surveys are completed, and the defendants in pursuance thereof have selected the lands

1. *Hart v. Clies*.

intended for the objects of the incorporation; when they enter upon the possession of and use the lands thus selected in the construction of their road, regardless and in defiance of the rights and possession of the owner of the fee, then may it be said in common parlance and in legal sense, that the defendants have taken the plaintiff's land; they are using it as their own, in exclusion of the plaintiff's right to use it. Although the legal fee may not be in them, yet are they exercising all the attributes of absolute ownership; they tear down houses, and out-houses; they cut up gardens, meadows, fields, and farms; they reduce hills and fill up valleys; they tear down fences, cut up and use the soil, as best answers their purposes, and do every act in relation thereto, which the absolute owner of the fee can do. If this is not taking land, I know not what act shall be deemed evidence of taking.

Can land be thus taken and used, and cut up, and disfigured, and occupied, without making compensation to the owner? The defendants' plea in this case insists that it can, and we are called upon solemnly to determine that such pretensions are well founded, and according to constitutional law. Is it pretended that the taking of land, means the taking the fee of the land, that no citizen shall be deprived of the fee of his land without just compensation? Is it, then, to be understood that the legislature can do anything and everything with the property of the citizen; and authorize its use and occupancy for all time to come, and that too, under constitutional sanction, so long as they do not interfere with the fee? Such a position would shock the common sense of the community, outrage public justice, and desecrate upon the altar of unrestrained omnipotent legislation, which is despotism, the life-blood and spirit of the constitution. But private property shall not be taken without just compensation. There can be no diversity of opinion as to the meaning of the words "just compensation." It is a fair equivalent in money, a *quid pro quo*; it is a recompense in value for the property taken. When the compensation is to be made, may perhaps be a matter of doubt; whether before the property is taken or used, or afterwards. It must either be paid before the property is taken, or within a reasonable time thereafter; and the making of this compensation must be as absolutely certain, as that the property is taken; it must not be dependent on any hazard, casualty, or contingency whatever. This I understand to be the spirit of our legislation hitherto, on subjects of this character.

The sixteenth section of the act to regulate highways, 2 R. L. 217, authorizes the laying out of roads, through improved and cultivated lands, and declares that the owner or owners thereof shall be paid such damages as he or they may sustain by reason thereof. The section then prescribes the manner in which such damages shall be ascertained; and declares that the whole of said damages, together with the charges of the commissioners, justices, and freeholders, and summoning the jury, shall be presented to the board of supervisors of the county, who shall cause the same to be raised, levied, and collected in the town in which the lands lie, in the same manner as the other town charges are by law directed to be raised, levied, and collected, and order the same to be paid to the commissioners of the town, who shall pay the owner the sum assessed to him, and appropriate the residue to satisfy the costs. Here, the faith and solvency of the town are pledged to the owner, that he shall certainly be paid for his property taken for the road. In such case the property is allowed to be taken and used before payment, and for the reason that the payment will certainly be made without hazard or doubt: *Gashweller's Heirs v. McIlvoy*, 1 A. K. Marsh. 84; *Jackson v. Winn's Heirs*, 4 Litt. 323.

So the act in relation to the opening and laying out streets in the city of New York, 2 R. L. 409, sec. 178, provides that when any lands, etc., shall be required for the purpose of opening any public square, place, street, or avenue, etc., or for the purpose of laying out and forming or extending, enlarging, straightening, altering, or otherwise improving any street, or public place, so to be laid out, etc., the same may be taken, and compensation and recompense made to the parties, etc., and the mayor, aldermen, and commonalty of the city may make application to the supreme court for the appointment of commissioners, who are to assess the damages to the owners whose lands are taken, etc., in the manner prescribed by the act, and to make report thereof to the supreme court, etc.; upon the final confirmation of the report, the corporation are declared seised in fee of the lands, etc., thus required for the public use, and may immediately take possession thereof, etc. In this act, also, provision for certain payment, without hazard, is made; the one hundred and eighty-third section, page 418, declares that the damages assessed, etc., shall, within four months after the confirmation of the report, be paid by the mayor, aldermen, and commonalty; and the damages are to be raised by tax, upon those of the citizens who ought to pay the same. The

faith and solvency of the city are here pledged for payment. To the same purport is the "act for opening and improving great roads within this state:" 3 Greenl. ed. of the Laws, 284; which provides for the assessment of damages, and directs payment out of the proceeds of three successive lotteries by that act authorized.

The third section of the canal act, Sess. L. of 1817, c. 262, declares it shall be lawful for the canal commissioners to enter upon, take possession of, and use all and singular, any lands, etc., for the promotion of the improvements intended by that act. The section then prescribes the mode in which the damages are to be assessed, and declares "the canal commissioners shall pay the damages, so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in the people of this state." The act does not provide any funds for the payment of the damages thus assessed; and although the faith of the state is impliedly pledged for the payment of these damages, yet was their payment dependent upon the contingency of the legislature being willing to make provision for their payment. With all due respect for the decision of the court in the case of *Rogers v. Bradshaw*, 20 Johns. 735, and while I am not disposed to arraign or question the high honor and integrity of the people's representatives, I can not subscribe to the constitutionality of the law depriving the citizen of his property, without providing an absolute, certain means for making to him ample remuneration; nor could I consent to surrender or compromise my judgment upon the faith I might have in the liberality, magnanimity, or justice of the legislature, that they would make provision for a just compensation, or payment for the property taken. Neither can I subscribe to the doctrine of the case of *Jerome v. Ross*, 7 Johns. Ch. 344 [11 Am. Dec. 484], which arose under the same canal act, in which Chancellor Kent says: "If the act we are examining has omitted to make any provision for the assessment and payment of damages, for such temporary use (the use of a rocky hill in getting stone for a dam), it may have escaped the attention of the legislature, or the case may have been deemed at the time immaterial and unimportant. The omission, however, if it be one, does not prevent the right of the commissioners to enter and use the land; nor prevent the just claim of the owner upon the commissioner or the legislature for his reasonable compensation. The commissioners are not trespassers, when the act authorizes them to enter before the damages are paid for. This was so under-

stood and declared in *Rogers v. Bradshaw*. The claim for compensation arises after the use has been had, and the damages can not well be assessed before they have arisen." I would have been better satisfied with that decision if the power of the court had been exerted in restraining the canal commissioners from interfering with the private rights of the citizen, until adequate provision for certain satisfaction had been made, as the chancellor directed in the case of *Gardner v. The Village of Newburgh*, hereafter to be mentioned, and as has been the course of the court in analogous cases: *Shand v. Henderson*, 2 Dow's Parl. 521; *Agar v. The Regents Canal Company*, Coop. Eq. 77; *Bellnap v. Bellnap*, 2 Johns. Ch. 463 [7 Am. Dec. 548]. The case of *Wheelock v. Pratt*, 4 Wend. 648, rests for its decision on the cases of *Rogers v. Bradshaw* and *Jerome v. Ross*.

At page 650, the late chief justice says: "Any law which should authorize private property to be taken for public use, and should at the same time direct that no compensation should be allowed for it, would be unconstitutional; but according to the preceding cases, a law which authorizes such appropriations, and merely omits to provide the mode of making such compensation, is not unconstitutional." It never could have been the intention of the constitution to authorize the legislature to take from a citizen his property, and leave him to trust for compensation, at the end of a law-suit against the canal commissioners, or to lobby the legislature, appealing to their magnanimity, justice, or mercy to provide him a compensation for his property taken for public use. The language of the constitution is explicit and unambiguous. "Private property shall not be taken for public use without just compensation." But according to some of the above decisions, private property may be taken for public use without even any provision being made by law for compensation. Compensation, according to my understanding, is to be made before the property be taken; or, indulging in great liberality of construction, the property may be taken, on there being an ample and absolute provision made for positive, certain payment, in a reasonable time, without subjecting the citizen to hazard, contingency, litigation, or imploration.

The act relative to turnpike companies, 1 R. L. 231, has been cited to us as more clearly indicative of the sense of the legislature, as to the extent of their constitutional power, in the particulars under consideration. The third section of that act authorizes the commissioners appointed by the governor to lay out the road directed by the act of incorporation, and directs

the commissioners to file an accurate map of the survey of the same; and in case of disagreement between the company and the owner of the land as to the value thereof necessary for the use of the company, and the damages (if any) to be done to said land, the damages are to be assessed in the manner prescribed by the act, "which each or any of the owner or owners of any parcel of land used and to be used for such road have sustained or will sustain; and the company, upon paying said owner or owners their damages, may have and hold to them and their successors and assigns forever, the lands and tenements, etc., provided that nothing in this act contained shall be construed to authorize the said president and directors to enter upon such land for the purpose of making such road until they have paid such damages," etc. It was in the spirit of this law and of the constitution that Chancellor Kent, in the case of *Gardner v. The Village of Newburgh*, 2 Johns. Ch. 166 [7 Am. Dec. 526], remarked, "To render the exercise of the power valid [the power of the legislature to take private property for necessary or useful public purposes], a fair compensation must in all cases be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power in taking private property for public uses. The limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments from a deep and universal sense of justice." See also *The People v. Platt*, 17 Johns. 215 [8 Am. Dec. 382]. In this case, the chancellor with great propriety exercised his judicial power in defense of private rights against legislative encroachment, by ordering an injunction to issue, prohibiting the trustees of Newburgh from diverting a stream of water of the plaintiff, to the supplying the village with pure and wholesome water, until some provision was made for affording compensation to the plaintiff; no provision having been made by the statute to remunerate those through whose land the water issuing from the spring had been accustomed to flow.

We are now prepared to look into the law incorporating this railroad company, with a view of ascertaining whether its provisions are in accordance with the constitution or its spirit; whether it directs payment to the plaintiff, or whether provision is made that he shall most certainly be paid for the land taken by the defendants for their road. If no provision be made for an absolute and certain payment at a future day, then we are

bound so to construe the law as to make it conform with the provisions of the constitution. The act provides, that the corporation shall pay the owner or owners for the land taken. When is this payment to be made? There is no precise specified time of payment particularly designated in the act, nor is there any safe and unquestioned fund provided for payment, nor any security provided therefor, except the solvency of the corporation. It can not be admitted that the legislature intended to deprive the plaintiff of his property, compelling him to rely on the solvency of this company for compensation. There is no certainty of payment in this; for *non constat* but that the company may be utterly insolvent before they shall have completed their enterprise. I have no doubt of the perfect solvency of this corporation, and their unquestioned ability to make compensation, either before they commenced or after they had completed their road; but we are looking for a principle which shall be of general application, irrespective of the solvency of any particular corporation—a principle which shall shield and protect the citizen from all hazard of loss, securing to him absolute certainty of compensation for his property taken for public use. To render the law constitutional, then, we must intend that the legislature, in the provisions they have made, have declared that compensation shall be made before the property can be taken.

This is no forced construction of the act. In the construction of statutes made in favor of corporations or particular persons, and in derogation of common right, which are statutes not deserving of much favor, we are not only not to extend them beyond their express words and their clear import: *Sprague v. Birdsell*, 2 Cow. 420; but are to confine them within the bounds and limits prescribed by the constitution; they are to be construed in favor of the legal owner, and in the preservation of his constitutional rights. The act declares that the corporation may enter upon, and take possession of, and use all such lands and real estate, etc., provided that all lands or real estate thus entered and taken possession of and used by the corporation, shall be purchased by the said corporation of the owner or owners of the same, at a price to be mutually agreed upon betwixt them. It is conceded that if the proviso had read, that all lands or real estate thus entered upon and taken possession of, and to be used by the said corporation, shall be purchased, etc., that there could have been no doubt that payment must precede the use. As, however, no certain payment at a future day is

provided, we must construe this law, in order to sustain its constitutionality, so as to read as suggested. The payment must precede the use. It is true, as suggested by the learned judge who delivered the opinion in the case in the court below, that "an examination of the soil by plowing or digging might be indispensable, in order to determine the practicability of a particular location, or the expediency of adopting one route in preference to another. The quantity of land necessary for the construction of the road, and the damages sustained by the owner in consequence of the taking or occupation thereof by the company, would scarcely, in any instance, be accurately determined until the road was completed, or considerably advanced in its construction." These are inconveniences easily to be foreseen in this case, as well as in all others where an attempt is made to violate the sanctity of private rights; but they are not to be taken into the account, nor to be urged in favor of those who, under color of law, are seeking to wrest from the citizen his private property.

Inconvenience and necessity, the standing arguments in justification of usurpation, are not here to be urged in excuse for frittering away or overriding the plain and palpable intent of the constitution. The rights of the citizen, at the hazard of all inconvenience and necessity, are to be scrupulously guarded and protected. The inconvenience suggested is in the power of the citizen to obviate; which he may or may not do, at his pleasure. If he is willing to assume upon himself the risk of receiving compensation for his land from the company, where no other certain means of payment is provided for him, he has the undoubted right to permit his land to be taken and used before payment; this is a matter of arrangement between him and the company, with which neither the government nor individuals have any right to interfere. But the learned judge says: "The proviso relates merely to the final and absolute vesting in the corporation of the fee simple of the land thus taken possession of; the land must be purchased, or appraised and paid for, before the title can vest in the corporation." This is certainly true; but the final and absolute vesting in the corporation of the fee, is imposed as a condition to the use of the land. The land is to be taken, provided the corporation purchase it of the owner; the fee in such case will be vested in the corporation by the conveyance; if they can not agree as to the price, then the damages are to be assessed in the manner pointed out by the act, and upon the corporation depositing in

any bank in the city of Albany, the amount of such damages to the credit of the owner, then the act transfers the fee to the corporation; in either event, the fee must pass before the corporation have any right to use and occupy the land. Any use or occupancy of the land without the consent of the owner, beyond examination and survey, before payment made in one or other of the modes prescribed by the act, is a trespass: *Hughes v. Trustees of Modern College*, 1 Ves. 188; *Shand v. Henderson*, 2 Dow's Parl. 521, 523; *Bellnap v. Bellnap*, 2 Johns. Oh. 473 [7 Am. Dec. 548].

The making or adequately providing compensation is a condition precedent; it must be fully and literally performed before the citizen can be deprived of the use, occupancy, or fee of his land. Let us for a moment see the effect of a contrary rule. If the corporation are justifiable in occupying and using the plaintiff's land without paying for it, and are not liable in trespass for such occupancy and use, why should the company want the fee? All the company want, is the undisturbed use of the land; to them it is totally unimportant in whom the fee is vested. They want not the fee, but the use; and if they can enjoy the use without making any compensation for such use, the purchase of the fee by them would be an idle, nonsensical waste of their money. Though corporations have no consciences nor souls to commiserate the condition of others; though they are not far-famed for a ready willingness to dispense justice to those who may have claims upon their coffers, yet they are proverbial for their keenness and sagacity in amassing wealth, and not too unfrequently at the expense of others. Who can imagine that a railroad corporation will pay for the fee of the land over which their road is laid, if they can have the undisturbed use of it for nothing? And what interest can they have in making an advance to have the amount of damages assessed, if they can fully enjoy the use and occupancy of the land without it; for it will be remembered that by the act, in case of a disagreement as to price, it is made the duty of the governor, upon a notice to be given to him by the said corporation, to appoint three commissioners, etc., to determine the damages. The owner of the land has nothing to do with it. He is not authorized by the act to take any measures to compel an assessment to be made; he must wait patiently the good will and pleasure of the corporation. I will here make the passing remark, that this provision of the statute authorizing the appointment of these commissioners, upon the application

of the company only, is clearly indicative of the sense and determination of the legislature that compensation must be made before the property can be taken or used. It is only in this view of the statute that the company could have any interest to make such application; an interest which the legislature intended to create for the protection of private right, and to compel a rigid compliance with the provisions of the constitution.

But it is said that the corporation will be compelled, by due course of law, to make remuneration, or in the language of the learned judge below, "That the plaintiff would have an ample remedy in such a case in some form of action, there can be no question." What form of action? I know of no action so simple and so well adapted to the attainment of full and equal justice as an action of trespass, particularly when trespass has been in point of fact committed, unjustified by any constitutional law, as that law would be, as set forth in the defendants' plea as a justification. It is further contended that the ascertainment of damages, and the payment thereof, are conditions subsequent. Subsequent to what? to the vesting of the fee? The fee is vested simultaneously with the payment of the damages, and not before. Subsequent to the use and occupation of the land? Then may the owner be prohibited from asking indemnification until the corporation shall have ended by its own limitation. Subsequent to the completion of the road? Where is the law declaratory of this, and where the tribunal or authority to determine when the road shall be deemed to be completed? But the road may never be completed; the corporators may abandon their enterprise in despair, from a conviction that it is absolutely profitless not only, but that if persevered in, would involve every one concerned in insolvency and ruin. Must, then, the owner's compensation for his land depend upon the contingency of the enterprise being a profitable or successful one? Who can subscribe to a proposition so monstrous and absurd? If there be any one act, thing, or event which can be named, subsequent to which the owner is to be paid for his land, what is the consequence of non-payment? A forfeiture, it is answered. A forfeiture of what? Not of the fee, for that does not vest till payment, but of the right to use and occupy the plaintiff's land for a railroad; a right which never existed, and never can exist but upon a just compensation made.

But admit the right to exist, and that it be forfeited for non-payment of the damages: Is this forfeiture compensation? Is this payment to the owner for the loss of his buildings, the dis-

figuration and mutilation of his property, his deprivation of the use of it, and the expense of replacing his buildings and fences, and restoring his fields to a condition fit for cultivation? Indeed, if this be the law of the land, far better would it be for us to be ruled with Asiatic despotism (for then we should know we were slaves), rather than live in a land of freedom, of written constitutions, guaranteeing to every citizen the enjoyment of his property, with assurance that it shall not be taken from him but upon just compensation, yet holding it upon so frail and precarious a tenure as the whim or caprice of a legislature, which would render our condition still more intolerable.

In *Jackson v. Winn's Heirs*, 4 Litt. 328, it was held that it was not competent to the legislature to take or apply to public use the property of any individual, without just compensation being previously made therefor; and Parker, C. J., in *Stevens v. The Proprietors of the Middlesex Canal*, 12 Mass. 468, said: "If the legislature should, for public advantage and convenience, authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording at the same time means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law against those who should cause the injury, for his damages. For although it might be lawful to do what the legislature should authorize, yet, to enforce the principles of the constitution for the security of private property, it might be necessary to consider such a legislative act as inoperative, so far as it trenched on the rights of individuals." See also *Callendar v. Marsh*,¹ 1 Pick. 431.

Upon the whole, I am of opinion that an action of trespass well lies in this case, and that the defendants' plea is radically defective, in that it does not aver payment made to the plaintiff for his land, in one or the other of the modes prescribed by the act, and that the judgment of the supreme court, based upon contrary principles, should be reversed. The decision, on this point, in my judgment, disposes of this case.

The chancellor, however, at the argument desired the court to pass distinctly on the question, whether the law incorporating the defendants was a constitutional law, and as a sufficient number of the members of the court had manifested their assent to the proposition of the chancellor, I shall proceed very briefly to consider that question. I might perhaps be permitted to ob-

1. *Callendar v. Marsh*.

serve, that little remains to be said after the very able and elaborate argument of the counsel in the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 45 [22 Am. Dec. 679], and the no less able and satisfactory opinion of the present chancellor, delivered on that occasion. Indeed, after the decision of that case, I had supposed there was no longer any room for doubt upon the subject. Doubts, however, it seems do exist, and it is meet and proper that that question should be put at rest by an express adjudication of this court: Vatt., b. 1., c. 9, sec. 100, says: "The utility of highways, bridges, canals, and in a word, of all safe and commodious ways of communication, can not be doubted. They facilitate the trade between one place and another, and render the conveyance of merchandise less expensive, as well as more certain and easy. The merchants are enabled to sell at a better price, and obtain preference; an attraction is held out to foreigners, whose merchandise is carried through the country, and who diffuse wealth in all places through which they pass: Sec. 101. One of the principal things that ought to employ the attention of the government, with respect to the welfare of the public in general and of trade in particular, must then relate to the highways, canals, etc., in which nothing ought to be neglected to render them safe and commodious: Sec. 103. The construction and preservation of all these works being attended with great expense, the nation may very justly oblige all those to contribute to them who receive advantage from their use. This is the legitimate origin of the right of toll.

These propositions have the ready assent of every enlightened individual in every country, and under any and every kind of government. In the days of Vattel there were no railroads, and in all probability the obligation of government to construct railroads in no measure entered into his consideration when indicting those general propositions; they nevertheless come within the spirit of national obligation in a most emphatic manner, as the government are thereby most effectually enabled to fulfill the just expectations and serve the most substantial interests of the community. That the government have not only the power, but that it is most emphatically their duty and interest, to construct railroads where the public interest and convenience demand them, can not admit of a doubt; for such purpose they are authorized to take private property, upon rendering just compensation; and they are in like manner justified in exacting toll from those who travel on them, as a means to

reimburse the state for the expense of their construction and reparation. I apprehend no one will be disposed to doubt or question the truth of these propositions. This state, as well as many, if not all of the states of this union, have, since the foundation of the government, exercised this rightful power in the construction of canals, some in the construction of railroads, and all in authorizing the construction of turnpike roads and bridges, and the establishment of ferries. Bridges and ferries are *publici juris*, and turnpike grants are made on the hypothesis that lands taken for the road are taken for public purposes: 7 Pick. 496;¹ 2 N. H. 25;² 20 Johns. 742, 743.³ If, however, the state shall not deem it wise or expedient, at its own expense, to construct a railroad, can there be any doubt of its power to impart this authority to others? I know of no instance in which this state has at its own expense constructed a turnpike road, and yet our statute books are filled with turnpike grants; and who has ever called them in question? Indeed, upon the argument here, as on all other occasions, it has ever been conceded that the legislature have an undoubted constitutional right to charter a turnpike company, and to authorize the company to take private property on which to construct their road, upon rendering just compensation. Such concessions having been always made by the most eminent counsel, and having been sanctioned by the most learned judges on constitutional law, practiced upon and acquiesced in since the organization of our government, present such an exposition of the constitution, and so ratify the exercise of this legislative power under it, that the courts will not shake or control it. *Stuart v. Laird*, 1 Cranch, 299.

Railroads are constructed for the same purposes and with the same objects as turnpike roads, to facilitate travel and the transportation of property, and the receiving of toll for such travel and transportation. The grant of an exclusive right to toll, as well on railroads as on turnpikes, is the consideration by which individuals are invited to expend money in their construction, and to assume the hazard of their being profitable enterprises: *Newburgh Turnpike Company*,⁴ 5 Johns. Ch. 112. Whether the toll be received by the state, or by the corporation, can not affect the character of the road for public usefulness, any more than the receipt of toll at bridges and ferries fixes the character of those works. Railroads are not only of

1. *Charles River Bridge Co. v. Warren Bridge Co.*

2. *State v. Town of Hampton.*

3. *Rogers v. Bradshaw.*

4. *Newburgh Turnpike Company v. Miller*; S. C., 9 Am. L. & C. 274.

great public use in the ordinary business transactions of the citizen, but they may be more advantageously used than turnpike roads for national purposes; for the transportation of troops and munitions of war at times when rapidity of transportation may be of vital importance to the safety of the republic; for the transportation of mails, and the rapid dissemination of intelligence, which is the life of liberty, and more than any other mode of conveyance, they tend to annihilate distance, bringing, in effect, places far distant near to each other: tending in their magic influence to the extension of personal acquaintance, the enlargement of business relations, and cementing more firmly the bond of fellowship and union between the inhabitants of the states. Next to the moral lever power of the press, should be ranked the beneficial influence of railroads in their effects upon the vast and increasing business relations of the nation, and the promoting, sustaining, and perpetuating the happiness, prosperity, and liberty of the people.

It is insisted that laws authorizing the construction of railroads are not constitutional, because the citizen can not travel upon them with his own carriage, when and as he pleases. Admit the fact to be so, are railroad laws to be deemed unconstitutional for this cause? Laws authorizing the construction of canals and turnpikes are conceded to be constitutional; yet can no citizen travel on either of these with such vehicles as he pleases; he can not use the canal with a boat of a size or structure different from what has been or may be prescribed by the canal commissioners; he can not be permitted to use it with a steamboat, destroying the embankments by the commotion of the waters which its wheels would create; he can not travel a turnpike with a vehicle which would occupy the whole road, thereby preventing other citizens from passing thereon. The convenience of travel, the safety of the citizens, and the accomplishment of all the ends designed by all public improvements, require the adaptation to each particular mode of travel of such vehicles of conveyance as are fit and suitable for the purpose.

An individual can not travel the canal with a four-wheeled carriage; nor a railroad with a canal-boat. Not only are the vehicles to be adapted to each particular mode of travel, but their use is, and necessarily must be, subjected to such salutary regulations as the public interests shall require, to secure to every citizen an equal, convenient, and safe participation and enjoyment of the improvement. In the nature of things, it can not be permitted that every citizen shall have a right to

place upon a railroad his own car and locomotive. The objects designed to be attained in the use of railroads, is the expedition and safety of conveyance; and in these the whole community have a deep interest, which must ever be considered paramount, and to which individual interests must yield: 4 T. R. 796.¹ It is obvious to the observation of all men, that if every individual should be at liberty to travel a railroad in his own car, there necessarily and unavoidably would be a great destruction of property and life; and the great ends which these improvements were designed to accomplish would be totally frustrated and destroyed. But because individuals may not in their own way use them, they are not the less public improvements; they are not the less of great public use, and do not less subserve the great interests of the community at large. The laws authorizing their construction, are, in my judgment, constitutional, provided a just compensation be made, or most certainly secured to the individuals whose lands shall be taken for their construction and use; and inasmuch as the act incorporating the defendants, authorizes the company to take the plaintiff's land upon making him a just compensation therefor, that act is therefore constitutional. It was well remarked by Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 128, that "the question whether a law be void for its repugnance to the constitution, is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." See also *Cooper v. Telfair*, 4 Cranch, 18, 19;² *Bank of Newbern v. Taylor*, 2 Murph. (N. C.) 266.

It is objected to the constitutionality of this law, that the value of the property taken for the road is directed to be assessed by commissioners, and not by a jury; and that the provision of the constitution of this state declaring "that no person shall be deprived of his property without due process of law," is violated. It does not follow, as is contended, that these damages are to be assessed by a jury in court. If this

1. *Governor etc. of the East Plate Manufacturers v. Meredith.*

2. 4. Dall. 18, 19.

rigid construction should prevail, the decrees of the chancellor and of the vice-chancellors, and the judgments of courts of record on the reports of referees, whereby property, both real and personal, to an immense amount, are sold by execution, and the title of one citizen thereto transferred to another, must be adjudged unconstitutional and void. It is unnecessary to enlarge on this point, as common sense and express judicial decision in this court (*Livingston v. Mayor of New York*, 8 Wend. 102), and the practice of this state since 1797 (3 Greenl. ed. of Laws, 286), and of almost every state in the union, have adopted this mode of assessing the damages of owners, where lands have been taken by authority of the government for public use, as the most convenient and best fitted to ascertain and fix that amount of just compensation to which the owners may be entitled. There is no question in dispute as to whom the property belongs, requiring judicial decision or the interposition of a jury; it is only in cases of controversial difficulties between citizen and citizen that this part of the constitution has application. In such cases the rights of the litigant parties to the property in controversy is to be determined by due course of law: See *Barker v. Henry*, Paine C. C. 565;¹ *Cooper v. Telfair*, 4 Cranch, 18.² But where the property of the citizen, acknowledgedly his, is taken by the government for public use, the only point of inquiry is, what is the value of the property taken, or the amount in damages which is to be paid to the owner, as a just compensation therefor? The mode, in which those damages are to be ascertained, is not prescribed in the constitution, and is by necessary consequence left to legislative discretion: *Livingston v. Mayor of New York*, 8 Wend. 102 [22 Am. Dec. 622].

It is further objected, that the company are not obligated to carry passengers or property, nor are they compelled to keep their road constantly in repair. This is an objection which might, perhaps, be successfully urged were we acting in a legislative capacity; but it certainly can have no influence in any decision to be made as to the constitutionality of the law. The public, however, are not remediless as against the evils suggested. The chancellor has full and ample power to correct any violation of the letter or spirit of the act, and to reform any abuses the company may venture to practice on the community: 4 Wheat. 676.³ And superadded to this, the legislature have reserved to themselves the right to alter, amend, or modify the act of incorporation.

1. 1 Paine C. C. 565.

2. 4 Dall. 18.

3. *Dartmouth College v. Woodward*.

Giving to the act incorporating the defendants, the construction I have given it, in relation to their obligation to make just compensation to the owner, before his land can be used and occupied in defiance of his rights, I have no hesitancy in saying it is a valid and constitutional law. If, however, the court shall determine that such construction shall be given to it as will authorize the defendants to use and occupy this land without making just compensation, in one of the modes directed by the act, then I am equally clear in saying that it is unconstitutional and void.

By TRACY, Senator. The first question in this case is, whether the proviso in the seventh section of the act incorporating the defendants is matter precedent or subsequent, that is, whether it contemplates that the railroad company should make compensation for the lands necessary for the construction of their road before they took possession of and converted them to their use, or merely imposes an obligation to pay for such lands as they should have taken possession of and converted to their use. If the first is the true construction of the proviso, then the plea is bad, for no principle of pleading is better settled than that where the authority relied upon for defense is dependent for its existence on a precedent act or event, the performance of that act or the occurrence of that event must be shown by the party seeking to justify under the authority; and this indeed is nothing more than saying, that a party seeking to justify, must show sufficient matter to justify. If, however, the proviso of the seventh section is merely an obligation on the defendants in case they shall have entered, and not a condition on the performance of which they may enter, then the plea is sufficient, if the legislature had the power of conferring upon the defendants the authority which the act expresses.

If the construction that should be given to the proviso in connection with the whole act be doubtful, there are two considerations which should incline the court to regard it as a condition; one is, that powers granted by the legislature to corporations or to individuals, in derogation of common right, should be construed strictly, and not extended beyond what is clearly expressed, and especially where the power claimed is derogatory to private property. The other consideration is, that of avoiding a construction which imputes to the legislature an attempt to exercise a power forbidden by the constitution; for mutual respect as well as public policy demands, that conflicts of opinion between different departments of the government,

on questions of constitutional power, should in all possible cases be avoided. But it is only in case of some reasonable doubt of the meaning of the legislature, founded in the language of the act, that these considerations should control courts in their exposition; for if consequences are to govern in the interpretation of a statute, notwithstanding its meaning is distinctly expressed by appropriate words, it will follow that courts, through an excessive solicitude to screen the legislature from the imputation of occasionally transcending its constitutional powers, will get habitually to transcend their own constitutional powers—and converting judicial into legislative functions, inflict a hundred wrongs where they remedy one. Although judges should charitably presume, in the absence of clear evidence to the contrary, that the legislature has not intended to derogate from common right, much less to transcend its constitutional powers, yet they must not forget that many very beneficial statutes are in derogation of common right, and that all legislatures are liable, through inadvertence or misconstruction, to exceed their constitutional powers.

The power accorded to our judicial tribunals of pronouncing upon the constitutionality of laws, is essentially original to the institutions of this country; at any rate, peculiarly appropriate and indeed indispensable to the adjustment and regulation of the action of a government purely democratic. The exertion of this power imposes upon the judiciary a delicate and often an unwelcome responsibility; but it is in the firm and fearless fulfillment of this responsibility that is found the most powerful if not the only effectual barrier that can be erected against the tyrannical exercise of political power. We are not at liberty, therefore, in the present case, to pervert the plain language, or disregard the explicit expressions of the statute, either from considerations of the hardships it may work to individuals, or from motives of delicacy, or feelings of respect towards the authority that enacted it; but if, on careful examination, we find its meaning and intention to be clear and positive, we must give effect to them, if that effect be constitutional, and if it be not, it is our province and duty explicitly to say so.

The act in the most direct terms authorizes the defendants to cause such surveys and examinations to be made as they should deem necessary to determine the most advantageous way or course in which to construct their railroad, and then expressly declares that it shall be lawful for them to enter upon and take possession of and use all such lands and real estate as may be

indispensable for the construction and maintenance of their railroad; and then comes the additional enactment, that lands thus taken possession of and used by the corporation, which are not donations, shall be purchased by the corporation of the owners, at a price mutually agreed upon; and if the parties can not agree, commissioners are to be appointed to determine the damages which the owners of the lands so entered upon by the corporation have sustained by the occupation thereof, etc.

If we confine ourselves to the language of the statute, and disregard all considerations of convenience or supposed necessity, which, from the nature of the subject, the legislature must be supposed to have had in view, it would be difficult to find words which would more distinctly authorize the defendants to enter upon the lands required for the construction of the road, in the first instance, and previously to any effort to obtain them of their owners by purchase or appraisement. And when we come to the provision enabling the defendants to obtain the fee of the lands, no language could more aptly express the intention of the legislature that it was only of those lands, in the use and occupation of which the defendants already were, that the fee could be obtained. It seems to me it would be inverting the whole order of proceedings authorized by the statute, and destroying the sense of the proviso, to say that "the damages which the owner or owners of the land so entered upon by the said corporation, has or have sustained by the occupation thereof," should be determined before they had been sustained. In the language of the supreme court, "It was obviously the intention of the legislature to authorize the corporation to enter upon and take possession of such land as they should think necessary for the route and construction of their road, without requiring as a condition precedent that the same should be (first) appraised and paid for." The reasons given by that court for this conclusion, founded on the nature and circumstances of the undertaking, are forcible and satisfactory, and in connection with the words, and the order of the words of the act, do not justify imputing to the legislature an intention of which they have afforded no evidence, and which I can not conscientiously say I think they entertained. A bare opinion that if their intention had been directed to the subject, as ours has been, they would have withheld or modified the power which their act bestows, is no warrant for me to do so. We are to be governed by the law as it is made, and not by speculations of what law would have been made had the legislature contem-

plated the subject in the new aspects in which it is presented to us. I feel constrained, therefore, to decide, that the plea in this case contains sufficient matter to justify the entry and occupation by the defendants, if the act conferring this right be constitutional.

Whether the act be or be not constitutional, is the next and by far the most interesting point of this case. The act is alleged to be in conflict with the provision of the constitution of this state, that private property shall not be taken for public use without just compensation. And under this point two questions arise: 1. Whether the use of the property by the defendants, for the purposes of a railroad, is a public use within the meaning of the constitution; and 2. Whether a just compensation for the property is secured to the owner. It is necessary that both these questions should be answered affirmatively in order to sustain the constitutionality of the law. But as I am clear in the opinion that the latter question can not be answered affirmatively, it does not, in my view of the case, become necessary to determine absolutely the answer that should be given to the other question; and I am the less disposed to assume unnecessarily the present decision of it, not only because it is one of the most difficult, and perhaps altogether the most important question that has ever been presented to this court since I have been a member of it, but also because the limited opportunity which I have had since the argument for its examination, does not assure me that I fully comprehend and accurately estimate all the considerations that should be regarded in the final disposition of it. But still, as the question, if not now definitively settled, will probably soon come here again, and in a form to require a direct decision, I feel that it may not be improper, nor wholly useless, to present, though in an imperfect form, a few considerations which some reflection upon the subject has suggested to my mind.

It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however despotic the form of the government might be, to take the property of one individual or subject, and bestow it upon another. The possession and exertion of such a power would be incompatible with the nature and object of all government; for it being admitted that a chief end for which government is instituted is, that every man may enjoy his own, it follows necessarily that the rightful exertion of a power by the government of taking arbitrarily from any man what is his own,

for the purpose of giving it to another, would subvert the foundation principle upon which the government was organized, and resolve the political community into its original chaotic elements. This power, therefore, instead of being acknowledged, was expressly repudiated by the Roman law at the height of imperial despotism; so that even when the lives of subjects were wantonly sacrificed by thousands at the remorseless bidding of cruel and capricious tyrants, no idea seems to have been entertained that they could, except by the interposition of legal forms, transfer the property of one subject to another. Even Hobbes, the most ingenious of all advocates for the absolute powers of government, does not go further with his doctrine on this point than to say, that the property which a subject has in his goods, consists not in a right to exclude the sovereign from the use of them, but consists in a right to exclude all other subjects from the use of them. But no approved writer on public law will be found to go as far as Hobbes in vindicating the unqualified right of the sovereign to assume at will the property of the subject. Every other writer is disposed to recognize a distinction between right and power as applied to sovereign and subject, and to acknowledge that a rightful government must be founded on some other principle than that of mere force. Hence an original compact, founded in the mutual necessities of the individuals about to constitute a political community, is implied in all cases, and the respective rights of sovereign and subject are referred to this supposed compact for their ascertainment. It follows, of course, that as the terms of this compact are capable of being shown only argumentatively, differences of opinion will exist in regard to them. To avoid this difficulty, is one great purpose of written constitutions.

But though differences of opinion exist as to the extent of the principle of the inviolability of private property, the secure possession and undisturbed enjoyment of property by individuals, is universally admitted to be the great cement of the social compact, and every publicist therefore feels the necessity of prescribing some safeguards for it against the encroachments of the sovereign power. At the same time all are ready to acknowledge it to be a principle of the social compact, assented to by the original members of it, that in public emergencies the right of individuals over their property must yield to the superior necessities of the state. Whether this principle be denominated the right of transcendental propriety, or of eminent domain, or, as is more properly by Grotius, the force of

supereminent dominion, it means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. This principle or right does not rest, as supposed by some, upon the notion that the state had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession of it, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign, it is held subject to a tacit agreement or implied reservation that it may be resumed, and all individual rights to it extinguished by a rightful exertion of sovereign power. Such a doctrine is bringing the principles of the social system back to the slavish theory of Hobbes, which however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly granted by it to individuals, is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments. Besides, it will not apply at all to personal property, which in many cases is entirely the creation of its individual owners; and yet the principle of appropriating private property to public use is full as extensive in regard to personal as to real property. But in whatever this principle is founded, the difficulty is not the less in determining the limits that rightfully bound it.

On this point, the writers upon public law are not agreed, nor is any one of them, that I have been able to consult, satisfactory; for, while all admit that the sovereign or transcendental propriety consists in the right of taking the property of individuals for the necessities of the state, no one succeeds in defining clearly the degree of necessity that justifies the exertion of this right; perhaps, from the nature of the case, such a definition is impracticable. Grotius, lib. 3, c. 20, sec. 7, asserts that the power can be exerted rightfully, not only in cases of extreme necessity, but for those of public utility (*ob publicam utilitatem*), while Puffendorff says, that "transcendental propriety never takes place but in the extremities and necessities of the commonwealth;" and yet he quotes from Bœcler what he says in his commentaries upon Grotius, "that this necessity hath its different degrees, and that it is not only in the last extremity this power should be made use of," though Bœcler admits "that it should not be extended too far, but should be reduced to equity as nigh as possible." Bynkershoeck insists

that private property can not be taken on any terms, without the consent of the owner, for purposes of public ornament or pleasure; and Burlemaque, in his *Principles of Law*, 145, speaks of this right as not to be exercised, "except in cases where it is absolutely necessary for the public good;" and again, page 150, that "it takes place only in a case of necessity of state, which ought not to have too great an extent, but should be tempered as much as possible with the rules of equity."

No doubt it was in full view to the discordant opinions expressed by writers on public law, in regard to the application of the principle of supereminent dominion, and with a matured design of affording special and additional protection to the citizen against the exertion of it by the government, that the framers of our national constitution adopted the clause in question; and it is reasonable to presume, that from the same motives and for the same object, it was transcribed literally from that instrument into the present constitution of this state. In both instruments, it is designed to be as well a limitation as a definition of the right of the respective governments as sovereign political powers, to interfere with the otherwise absolute right of the citizen, to the undisturbed possession and enjoyment of his own property. It is therefore, I think, to be construed in both cases as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken only for the public use, and then only upon a just compensation.

It is not very certain that the constitution of the United States contemplates by this provision any other than a direct use by the government itself through its officers, and for the purposes of the government as a political being—as in cases of impressment for military service, or the taking of lands for forts, light-houses, dock-yards, etc.; and it may be doubted whether the national government has the power by virtue of sovereignty to take private property, without the consent of its owner, for the purpose of dedicating it to a popular public use, by which is meant a use by the people generally as individual beings, as for a common highway. If it be correct that the constitution of the United States does not reach a case of a mere popular use, but is restricted in the meaning of public use to a use by the government as an organized political being, a question possibly might arise whether the same words transferred to the constitution of this state are to be restricted to the same meaning, and whether the introduction of them into our constitution does not so far

operate as a new limitation of the powers of the state functionaries as to make the legislative acts, appropriating private property, passed previously to the new constitution, at best but questionable precedents for those that may be passed subsequently to its adoption. But admitting that the general welfare and even imperative public necessity require such a construction of legislative power as shall authorize the appropriation of private property, not only for the use of the state in its political character, as in case of canals or other public works, where the whole property remains in the state, but also for the use of the people distributively, or as individual members or parts of the political community, as in case of highways, streets, squares, etc., we are then to inquire, first, whether the term public use is not in either case to be confined to its simple sense of direct possession, occupation, and enjoyment by the public; and second, is not the power of taking private property for public use, in any event, such an attribute of sovereignty that it must be exercised directly by the sovereignty acting through public political agents, and can not be delegated to individuals or corporations, not public political agents, to be by them exercised at their own discretion and for their own benefit?

When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. One man, unwisely, perhaps, prefers to suffer his lands to lie unoccupied, or his water power to remain unimproved, which another is anxious to convert to uses highly advantageous to the public. On what principle shall a law, transferring the title from the owner to his more enterprising neighbor, on the payment of a just compensation, be pronounced unconstitutional, if using property beneficially to the public, is to be deemed a public use of it? The remark of an eminent jurist, 2 Kent Com. 340, that "it must undoubtedly rest in the wisdom of the legislature to determine when public uses require the assumption of private property; and if

they should take it for a purpose not of a public nature, as if the legislature should take the property of A. and give it to B., the law would be unconstitutional and void," is correct, if intended to concede to the legislature merely the power of determining what property in a particular case shall be taken for the public use, but it can not be correct, if intended to concede to the legislature the power of determining what constitutes a public use of private property; and therefore I must dissent from the position taken by the chancellor in *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 73 [22 Am. Dec. 679], where he says: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals."

This position, it will be seen, disregards the distinction between a public use and a public interest in a particular use of private property, and confers on the legislature the right of determining, first, that the public interest will be promoted by the particular use of private property; and next, because the public interest will be promoted by such use, that therefore it is a public use; and finally, it being a public use, it becomes a mere question of expediency with the legislature whether they shall authorize private property to be taken to subserve it or not. It seems to me that such a construction of legislative powers is inconsistent with the secure possession and enjoyment of private property, and repugnant to the language and object of the constitutional provision. Indeed, it concedes to legislative discretion a wider range than I think could be maintained for it on the principles of natural law, if we had no written constitution.

It is not denied that the legislature is the most appropriate organ of the sovereignty of the state for exercising the right of eminent domain, but they can only exercise the right or power in subordination to the constitutional authority; which authority they can not enlarge or modify. The condition that the property must be taken for public use is as much above their reach and control as it is above the reach and control of the lowest functionary of the government, who, like them, may have occasion to invoke this attribute of sovereignty in an emergency of some humble department of the public service, with which he may have been charged. The legislature may fitly determine

when and under what circumstances, as to the mode of taking private property shall be taken for the public use. But it by no means follows, as seems to have been supposed, that the legislature can determine that a particular use is a public use of private property, within the meaning of the constitution. The nature of the use to which the legislature may dedicate the property of a citizen, is not established by the name which they give to it, but is an inherent and inseparable quality or characteristic which can not be changed, however it be denominated. Much less are we to confound the notion of legislative discretion with that of sovereign power. The legislature is not the sovereignty of the state, but only one of the organs of the sovereignty, and a restricted organ in regard to all matters prescribed by the constitution, and necessarily, therefore, can not exercise any power which by the fundamental compact is prohibited to the sovereignty. It is prohibited to the government of the state, even in its sovereign capacity, to take private property except for public use; consequently it is not in the power of the legislature to authorize private property to be taken for any other purpose.

Nor can this restriction, which is upon both the government, as a sovereignty, and upon the legislature, as its organ, be evaded, or the power which it limits be extended, under whatever form or by whatever name it may be attempted. If it be called the right of eminent domain, or of supereminent dominion, it comes to the same result, for these are only other names for sovereign power, and are equally included and controlled by the constitutional restriction. Therefore, to insist that the determination or expression by the legislature that it is for the public interest and expedient in a particular case to exert the right of eminent domain, or the power of sovereignty, *ipso facto*, establishes that the power of sovereignty is rightfully exerted, is in effect to insist that the power of the legislature is above the power of the constitution, and to prove that instead of possessing a government of defined and limited powers, we have one with powers more extensive and irresponsible than those of the regal governments of Europe. But happily for us, this is not so; the legislature is not the creator or judge of its own powers; but is the creature of the constitution, and all its acts must be in subordination to it. In the examination, therefore, of a question involving the construction of constitutional powers, courts are to be guided by the constitution itself, and are not to be controlled by the

acts of the legislature, or to be further influenced by them than a due respect for the apparent opinions of a co-ordinate branch of the government may demand. Conceding freely to the legislature the right of appropriating private property to the public use, but denying confidently to it the power of making that a public use which in its nature is not: the question recurs, whether the use by the defendants of the lands taken from the plaintiff, for the purpose of constructing thereon a railroad, to be owned and possessed by them as a corporation, is that public use for which alone private property can be taken?

It can scarcely be urged that the mere circumstance that the defendants are a corporation, makes their case different from what it would be, were they a simple association or copartnership; for the shareholders or proprietors are equally private citizens, and no more public agents in a political sense in the one case than in the other. Their obligation to the public and their liability to individuals, whatever that obligation and liability may be, are not affected by the fact of being incorporated, for had the legislature granted to enumerated individuals without the forms of incorporation, the same privileges and powers, their duties and responsibilities would have been the same. A franchise may be granted to persons in their natural capacity, as well as to them in a corporate capacity. The road, therefore, is none the less the private property of the defendants; and the construction, possession, and occupation of it are none the less for private emolument, than it would be were the owners of it unincorporated. In looking at the question in this aspect, it will be found essentially disembarrassed from all other considerations than such as relate to the fact, whether railroads, built, owned, and possessed by individuals, but for the purpose of transporting for pay, such passengers as may desire to be transported on them, are for that reason public roads, or roads in the making of which the public, in its sovereign sense, has that degree and description of interest, that private property may be taken without the consent of its owner, for the purpose of constructing them, on the principle that it is thereby appropriated to the public use. The argument in support of this position rests mainly on the ground that railroads are public improvements, the advantages of which are available by every person who seeks them, and that they are not distinguishable from public highways, and especially not from turnpike roads. This position is also attempted to be fortified by the circumstance that the privilege of making a road and taking tolls is a

franchise, and as such, is subject to be regulated and restricted by the legislature.

It is not to be doubted that railroads are in many cases public improvements of great value and usefulness; and when limited in number and extent to the means and wants of the country, productive of an increase of comfort and convenience to individuals, and of wealth and power to the communities in which they exist, and that such is the character of the particular railroad owned by the defendants in this case, should be freely admitted. But is this enough to justify the conclusion, that because the use to which it is dedicated by its owners, accommodates individuals, and thereby advances the public interest, therefore it is such a public use that private property may be taken to promote it? Can the constitutional expression, public use, be made synonymous with public improvement or general convenience and advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees? If an incidental benefit resulting to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intention of the constitution, it will be found very difficult to set limits to the power of appropriating private property. It is hardly necessary to illustrate by supposed cases the extent to which such a doctrine could be legitimately carried. A person anxious to establish a line of stages for the public accommodation, certainly might ask the interposition of the legislature to enable him to appropriate his neighbor's horses for the public use; and even in the present case, the legislature might have authorized the corporation to take personal property, such as horses, cars, etc., which was necessary for the maintenance of their railroad, on the same principle as that on which rests the authority to take the lands of the plaintiff. It is not sufficient to say that the legislature will exercise this power of appropriating private property with discretion, when the inquiry is, whether the security of the citizen rests in the discretion of the legislature, or in the guaranty of the constitution.

The circumstance that the privilege of making a railroad and taking tolls thereon is a franchise, seems to me to have less force in determining this question than has been attributed to it. All corporate privileges are franchises, and the use of them may be regulated or restricted by legislation as much as the franchises of railroad corporations. Banking corporations, in-

insurance corporations, and many others, are franchises, and the grant of them has been as distinctly on the ground of promoting the public interest, as the grant of railroads. In every sense bearing on this question, a license to keep a tavern is a franchise, and the obligation of the tavern-keeper to the public and to individuals, is as defined and as extensive in its nature as that of a railroad company; and there is the additional analogy of the license being granted for public accommodation and benefit. But when we come to cases like these, the distinction between the taking of private property for public use, and the taking of it for an individual use, beneficial to the public, becomes marked and obvious.

I find only one decision, out of our state, that palpably confounds this distinction, and this was by a court in Tennessee, where it was held that under a law passed in 1777, the land of one citizen could be taken for the use of the mill of another, on the ground that the mill was necessary for the neighborhood, and the miller a public agent. But even this is founded on assumptions not maintainable in this case, and how far it was influenced by the consideration that the act authorizing the appropriation was anterior to the constitution of the state, does not appear. If, however, it decides the general proposition, that the legislature can appropriate the land of one citizen to make a mill-dam for another, it must also in effect decide the more startling proposition, which I am sure neither the courts nor the people of this state are prepared to admit, that the legislature can transfer the unimproved mill-site of one citizen to another, for the purpose of enabling the latter to build a mill for the public accommodation. The case 3 Fair. 233,¹ turns on the point, that it is no objection to the power of appropriating private property to the public use by the legislature, that the measure contributes also to the emolument and advantage of individuals or corporations—a position which in the present case it is not important to examine.

The distinction between the taking of private property for a canal or other works owned by the state, or for a common public highway, and the taking of it for a railroad, to be owned by a corporation, or by individuals, is too obvious to need particular illustration. But the distinction between taking private property for a turnpike road and the taking of it for a railroad, is certainly much less so. It is indeed not easy to draw the line, for at some points the two cases approximate and almost

1. *Cottrell v. Myrick.*

blend, so as scarcely to admit of separation. Still I think there is a distinction, founded on sensible circumstances, and they who insist there is not, should bear in mind that by confounding them, they do not necessarily prove that the power granted to railroad companies of appropriating private property is constitutional—they may only prove that the power granted to turnpike companies is not. This distinction will be seen, I think, both in the different modes of using the two roads, and in the nature of the property which the respective companies have in them. In the case of turnpikes, it is not only that the use of them by all persons is unrestrained and direct, in their own vehicles, with their own motive powers, and according to their own inclination as to time and speed; while in the case of railroads, the entire immediate use is by the owners of them, subjected to no rules but such as are prompted by a regard for their own interest or convenience. Also, in the case of turnpikes, every person has the power and right of using the road so as to make the use of it a means of profit to himself, as by running carriages for the transportation of persons or property; while in the case of railroads, the immediate use of the road being with the proprietors of it, it can be a means of direct profit only to them. The property, also, which the companies have in the two descriptions of road will be found materially different. A turnpike company has a limited or qualified, and not an absolute estate in its road.

The sixteenth section of the general turnpike law, 1 R. S. 584, and which is but a general enactment of a provision inserted in almost every previous turnpike charter, provides that every turnpike corporation, when it shall have been compensated all moneys expended, etc., with ten per cent. interest, may be dissolved by the legislature, and then “all the rights and property of such corporation shall vest in the people of this state.” The effect of this provision, it will be seen, is to secure the ultimate property of the road to the people, and to allow the corporation to keep the road and levy tolls for the use of it, only until they are reasonably compensated for the moneys they have expended in its construction and maintenance. The corporation are *quasi* mortgagees of the road, in possession for the purpose of reimbursing themselves, by tolls, for the moneys advanced by them in that behalf for the public; and the case, in this respect, is not essentially different from what it would be if the state made these roads and imposed tolls for the mere purpose of obtaining re-

payment of the moneys expended, with interest, to compensate for the risk. In the one case as in the other, the public at large has a benefit in the perception of the tolls, inasmuch as their application must be to discharge the incumbrance which is on the road, and to make it in every sense a free public highway. It was no doubt in view of this peculiar feature, that Chancellor Kent observed, in *Rogers v. Bradshaw*, 20 Johns. 742, "Turnpike roads are, in point of fact, the most public roads or highways that are known to exist, and in point of law they are made entirely for public use, and the community have a deep interest in their construction or preservation." But in the charter of railroad companies, especially the one now under consideration, there is no provision securing the ultimate property to the public. There is, to be sure, a right secured to the state of purchasing within a prescribed period; but which, until exerted, creates no reversionary interest in the state, and consequently the public has no benefit, direct or remote, from the earnings of the road, which, however much they may exceed the original outlay and interest and expenses, are still for the exclusive advantage of the proprietors.

The next inquiry in order which is suggested is, whether the taking of private property for public use be not an act of sovereign power that can only be exerted directly through political agents or public officers, and can not be delegated to private individuals or to a private corporation, for them to exert at their own discretion and for their own benefit? That the defendants are a private corporation, as distinguished from a public or political corporation, will not admit of any dispute. It is not sufficient to give a corporation the character of a public corporation, that its operations are beneficial to the public; for in such sense, almost every corporation having its origin in individual enterprise and its object in individual gains, would be denominated public; and not only banks and insurance companies, but transportation and manufacturing companies be embraced. "Strictly speaking," says Mr. Justice Story, *Dartmouth College v. Woodward*, 4 Wheat. 468, 494,¹ "public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government, such as towns, cities, counties; but a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance,

1. 4 Wheat. 518:

bridge, and turnpike companies." It will be seen that the term public should be confined to corporations constituting political or municipal communities which are clothed with extensive civil authority, and have for their object the government of particular portions of the state.

The civil code of Louisiana, tit. 10, c. 1, art. 420, makes the only division of corporations into political and private. The first are those which have principally for their object the administration of the government of a portion of the state, and to whom a part of the powers of the government is delegated to that effect; and although such a corporation may have involved in it some private interests, yet as its principal object is the exercise of municipal or political functions, it seems to be appropriately termed a political or public corporation. The civil or municipal powers of such corporations may be regarded rather as distributions than as delegations of the sovereign powers of the political commonwealth of which they are organized parts; for, being recognized by the constitution or original compact of the community, they possess within their prescribed spheres of action a right to the discretionary exercise of certain political faculties, which does not and can not attach to a citizen or association of citizens, not distinctly clothed with a public official or political character. Town officers, for instance, though elected by a local corporation, as a particular town, are in every sense public officers, and in their appropriate spheres of action, the legitimate organs or representatives of the sovereignty of the whole state, as much as the governor of the state when acting within his constitutional sphere; and the exertion by them of the right of sovereignty to appropriate private property for a necessary public use, as land for a highway, or materials for repairing it, is as legitimate and as direct an exertion of the right of sovereignty, as the dedication of particular property to the public use by a legislative act.

But this is a power or right which, from the nature of the case, can not be exerted by private individuals, and consequently not by a private corporation through agents appointed by itself. They alone can exert it, who are public officers or political agents, or organs of the sovereign power. In this case, who is it that has taken the plaintiff's lands, and appropriated them for the purposes of the defendants? Not the legislature, for they have not in their act declared what lands, or that any lands belonging to the plaintiff, are to be appropriated; not any public officer or political agent, for no such offi-

cer or agent is designated or provided for by the act. It is not then on the exercise of the sovereign discretion by the legislature, or by any other agent or organ of the political community, or on any responsible and official judgment, that the particular lands belonging to the plaintiff were necessary for the public use, that they have been appropriated; but the appropriation has been made by a private corporation acting through its own agents, on its unofficial and irresponsible opinion or judgment that the lands were necessary for the uses of their railroad. The plea states, that among other things it is enacted that the said corporation are authorized by their agents, surveyors, and engineers, to cause such examinations, surveys, etc., as should be necessary to determine the most advantageous route, etc., for the construction of their railroad, and that it should be lawful for the said corporation to enter upon, take possession of, and use all such lands and real estate as might be indispensable for the construction and maintenance of their railroad, etc., and the accommodations requisite and appertaining thereto, etc.

This, it will be seen, is a delegation of a power of a sovereignty of the state; not to public officers or to a political corporation, or even to designated individuals, but to a private corporation, to be by that corporation exerted according to its own judgment of its own necessities. This case must not be confounded with one where the legislature has appropriated, or directed to be appropriated specific property to the public use; nor with one where it has devolved upon subordinate political agents the power and duty of selecting and determining what property shall be appropriated to a particular public use, as in the case of the canal commissioners, or even in that of lands taken for a turnpike road. In the latter case, which has been supposed to be in strict analogy with the present case, it will be found that this political power is never proposed to be conferred on the corporation. Section 17 of the general turnpike law, provides that the road shall be laid out by commissioners appointed by the governor, who shall not be interested in the road, nor live in any county through which it passes. When, therefore, the lands of a citizen are appropriated for a turnpike road, it is upon the judgment and decision of public political agents of the sovereignty, and is therefore the act of the sovereign power. But here we find no judgment or decision upon the particular subject-matter, by any person or tribunal in political relation with the government. Admit that the use of

private property for the purposes of the railroad is a public use, and that the legislature could make the appropriation. Has the legislature in fact made the appropriation? Certainly it has not passed on the fact, that any particular property should be taken for this purpose; nor has any other agent or organ of the sovereign power passed on this fact.

How then does it appear that the state by virtue of its sovereign right has resumed this particular property? It can not be contended that the right of eminent domain in the sovereignty is an alienable right, and transferable. It would be a solecism to say so. Yet it would seem to be on this notion only, that a private corporation through its own agents could exert this great political prerogative. For unless it be assumed that the sovereign right of eminent domain was vested by the legislature in the corporation, to be by the corporation exerted according to its views of public necessities, it can not be shown, that in respect to the particular premises in controversy, it has ever been exerted at all. And if this be assumed, it follows that the highest responsibilities of the government may be devolved on a moral nonentity, which from its nature is incapable of exercising political responsibilities.

But leaving the discussion of these questions, into which I have gone much further than I anticipated, I come to the examination of that point of the case in the decision of which I am clearly of opinion that the supreme court has erred. I mean the proposition that the act provides a just compensation to the owners for their property, taken without their consent. I have already expressed my concurrence with the supreme court in the conclusion that the act incorporating the defendants, contemplates and authorizes an entry and possession for the purposes of survey and examination, and for the construction of the road, prior to compensating the owners, and prior to taking any measures to secure an ultimate compensation. It only remains, therefore, to see if under the act there is any mode by which the owners ultimately can obtain compensation, and if there be, whether such ultimate compensation is the "just compensation" which the constitution makes the indispensable condition for the taking of private property for public use. In construing the proviso of the seventh section in the nature of a condition subsequent, as has been done by the supreme court, and as I think the language and meaning of the whole act requires, there is room for doubt whether the corporation is bound to take any steps for ascertaining and compensating the

damages occasioned by their entry and possession, unless they choose to obtain the fee of the land; at least it is questionable whether the owners of the lands possess any certain means for compelling them to do so.

The act prescribes no time within which the corporation shall proceed to agree for the purchase of the lands, or to procure the appointment of commissioners to determine the damages in case of disagreement; and it may not be easy to show that they could not as rightfully continue to use the road after it was constructed, without paying for the land, as they could take possession of the land without paying for it, for the purpose of constructing their railroad. But assuming, as it may be but just to do, that the corporation is bound by the equity of the act to proceed to purchase the lands by agreement or by appraisal, within a reasonable time after the road is constructed, what will be the remedy of the owners if they do not? In strict law, the only remedy for the breach of a condition subsequent is a re-entry upon the land. The breach of a condition subsequent does not make the estate void without entry, as a limitation will: Co. Lit. 218 (a). It is unnecessary to show how far short of a just compensation, or an equivalent for it, such a remedy would be.

The supreme court suggests the idea that an unreasonable delay in acquiring the title might render the corporation trespassers *ab initio*. But is this idea well founded? If the corporation had lawful authority to enter upon the lands of the plaintiff, and do the acts complained of previously to making compensation, there would be no occasion for them to do anything afterwards which could constitute them trespassers. The *Six Carpenters' case*, 8 Co. 290,¹ which carries the doctrine of trespass *ab initio* to the extremest verge of sense or reason, does not reach a case like the present one. It is there ruled, that not doing can not make the party who has authority or license a trespasser *ab initio*, because not doing is no trespass. This sensible distinction is recognized in the case, 5 Barn. & Cress. 279,² in which it is decided that it is only where the subsequent act is a trespass of itself, that the party can be made a trespasser *ab initio*. No argument seems necessary to show that where the corporation is lawfully in possession, under and for the purposes of the statute, a delay to acquire the fee would not be in itself a trespass, but at most a "not doing," within the meaning of the *Six Carpenters' case*.

1. 8 Co. 146.2. *Miscitation*.

I confess I am not able to see as plainly as the supreme court seem to have done, that there can be no question but "that the plaintiff would have an ample remedy in some form of action;" and I regret that that court has not pointed out the particular form of action by which this ample remedy could be obtained. The counsel has attempted to supply the omission by urging the catholicon, action on the case, as affording this ample remedy. But I am not satisfied that the plea which has been put in would not be as available to an action on the case, as it undoubtedly would be in the present action, were the authority pleaded allowed to be constitutionally given. The difficulty in both cases is, that there is not a clear and certain obligation imposed on the corporation to proceed to ascertain and compensate the damages, unless and until they elect to acquire the fee of the lands.

But if it be admitted that in the event of an unreasonable delay by the defendants to proceed according to the proviso to obtain the fee of the land, the plaintiff might maintain an action on the case, or otherwise, to recover his damages, the inquiry then recurs whether a subsequent and contingent right to an action at law to recover damages against corporations or individuals of undefined responsibility is that "just compensation," without which the constitution declares private property shall not be taken. If it be, one is constrained to feel that our boasted constitutional guaranty, against the encroachments of the government upon the sacred rights of private property, is at best but solemn mockery—a provision "that keeps the word of promise to our ear and breaks it to our hope." Assuming that land taken for the construction of a railroad is taken for public use, as much as when taken for a canal owned by the state, or for a public road laid out by the town officers under the highway act, or for a turnpike road, it is vain to seek an analogy in respect to the certainty of the compensation secured in the one case and in the others. In regard to lands taken for state canals or for common highways, the fund from which compensation is secured is a public one and certain, and the means for ascertaining the damages and for reaching the fund are defined, specific, and at the command of the party injured; and in regard to lands appropriated to a turnpike road, the statute requires not only that the damages shall be assessed, but actually paid or tendered before the lands can be entered upon by the corporation.

I am aware of the intimation by high authority in *Jerome v.*

Ross, 7 Johns. Ch. 344 [11 Am. Dec. 484], that it is not necessary to the validity of a statute, authorizing private property to be taken for public use, that a remedy should also be provided for the owner of it to obtain compensation; but what was subsequently said by the same distinguished judge, 2 Kent Com. 389, affords reason for supposing that he doubted the correctness of this intimation. In speaking of the right of the government to take private property for public use, he says: "In these and other instances that might be enumerated, the interest of the public is deemed paramount to that of any individual; and yet even here the constitution of the United States, and most of the states of the union, have imposed a just and valuable check upon the exercise of legislative power, by declaring that private property should not 'be taken for public use without a just compensation.' A provision for compensation is a necessary attendant on the due and constitutional exercise of the power given to deprive an individual of his property without his consent; and this principle, in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law." If it be not that a provision for compensation is an indispensable ingredient of a law appropriating private property to public use, then are the citizens of this country less secure in the possession and enjoyment of their property under constitutional guaranties than the subjects of the British government, whose rights are undefined by any written constitution, and whose political privileges are supposed by many to be entirely subject to the omnipotent legislation of parliament. Blackstone, speaking of the sovereign right of the legislature to take the property of a subject for public use, says its interference in such a case is "not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for exchange. All that the legislature does is to oblige the owner to alienate his possessions at a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform:" 1 Bl. Com. 139.

I have always thought the decision in *Rogers v. Bradshaw*, 20 Johns. 735, went quite as far as could be reconciled with the letter or spirit of the constitution; but I have no disposition to question the correctness of that decision, and much less to

deny that it is, just as far as that case goes, a settled judicial construction. But in acknowledging that the spirit of the constitution is complied with, if legal provision for compensation is made, though the party can not avail himself of it till after his property has been taken, I can not acknowledge, however high the authority may be to the contrary, that private property can be constitutionally taken even for public use, under a law which does not provide a defined and certain mode for the owner of it to obtain a just equivalent. The argument, that a law appropriating private property, without the owner's consent, and which contains no such provision, is constitutional, simply on the ground that those having the benefit of another's property, are in justice bound to pay for it, and therefore the law will give the party an action to compel a compensation, is, to say 'he best of it, an argument which proves the constitutional provision utterly nugatory; for so far as legal remedy is supposed to be a necessary attendant upon an abstract right, it would be available as well without the constitution as with it. But if a law be constitutional, which takes from a citizen his property without expressly providing means for compensating him, it is not easy to show that he would have any legal remedy for obtaining compensation. If he had, however, a clear right to maintain an action, it seems very unreasonable to imagine, that a bare right to a remedy against an individual, and much less against a corporation where there is no individual liability, and, it may be, no corporate responsibility, is that "just compensation" of which the constitution speaks. It can not be that courts will attempt to refine the simple, plain, and effectual security of the constitution provided by the people themselves as a necessary safeguard for their property, against the eager hand of legislation, into that "most unsubstantial, unessential shade," a right of action.

I conclude, therefore, that in the present case, where there was no public fund, which in law and in fact must be deemed always adequate to insure the payment of such damages as shall be found to have accrued, that the legislature could not authorize the defendants to enter upon and possess and use the lands belonging to the plaintiff, until they had first paid, or offered to pay to him, a just compensation therefor; and that the plea in this case, containing no averment that compensation had been made or offered, is bad, and therefore the judgment of the supreme court which sustains the sufficiency of the plea should be reversed.

On the question being put, Shall this judgment be reversed? the members of the court divided as follows:

In the affirmative: The chancellor, and Senators ARMSTRONG, BECKWITH, DOWNING, EDWARDS, FOX, LACY, LAWYER, LOOMIS, MAISON, POWERS, SPRAKER, STERLING, TALLMADGE, TRACY, VAN DYKE, WAGER, WILLES, WORKS—19.

In the negative: Senators L. BEARDSLEY, JOHNSON, J. P. JONES, LIVINGSTON—4.

A resolution was then offered, declaring in substance, that the legislature of this state have the constitutional power to authorize the taking of private property for the purpose of making railroads or other public improvements of the like nature: whether such improvements be made by the state itself or through the medium of a corporation or joint stock company, on making ample provision for a just compensation for the property taken to the owners thereof. On the question being put, Shall this resolution be adopted? the members of the court divided as follows:

In the affirmative: The chancellor, and Senators ARMSTRONG, L. BEARDSLEY, BECKWITH, DOWNING, EDWARDS, FOX, JOHNSON, J. P. JONES, LAWYER, LIVINGSTON, MAISON, POWERS, SPRAKER, STERLING, TALLMADGE, WAGER—17.

In the negative: Senators LACY, LOOMIS, WORKS—3.

Whereupon the following judgment was entered:

Counsel having been heard in this cause, and due deliberation being thereupon had, it is declared and adjudged that the legislature of this state has the constitutional power and right to authorize the taking of private property for the purpose of making railroads or other public improvements of the like nature, paying the owners of such property a full compensation therefor, whether such public improvements are made by the state itself or through the medium of a corporation or joint stock company; but that by the true construction of the defendants' charter or act of incorporation, they were not authorized to take and appropriate the plaintiff's land to their use, for the purpose of making their railway thereon, until his damages were appraised and paid, or deposited for his use, as provided for in the act of incorporation. It is therefore ordered and adjudged that the judgment of the supreme court in this cause be, and the same is hereby reversed, and that the plaintiff be restored to all things which he has lost thereby; and it is further ordered and adjudged, that the second plea of the de-

fendants, and the matters therein contained, are not sufficient in law to bar the plaintiff from having and maintaining his action against the defendants: but that the defendants have leave to amend their plea within such time as the supreme court may direct, upon payment of the costs upon the demurrer in that court; and it is further ordered and adjudged, that the plaintiff recover against the defendants his costs in this court to be taxed, and that the record and proceedings be remitted, etc.

Few cases have been cited more frequently than the principal case, either in the state in which it was decided, or in other jurisdictions. Thus it is relied upon to show that railroads, though owned by individuals or by private corporations, are of public necessity and importance, and therefore that the power of eminent domain may be exercised in their behalf, in *Olcott v. Supervisors*, 16 Wall. 695; *S. & V. R. R. v. City of Stockton*, 41 Cal. 179; *Clarke v. City of Rochester*, 5 Abb. Pr. 124; 14 How. Pr. 211; *Bellinger v. N. Y. Cent. R. R.*, 23 N. Y. 48; *Drake v. Hudson River R. R. Co.*, 7 Barb. 552; *Parmelee v. Oswego & S. R. R. Co.*, 7 Id. 625; *Gould v. Hudson R. R. Co.*, 12 Id. 628; *People v. Law*, 34 Id. 502; *People v. Kerr*, 27 N. Y. 91; to show that the state may exercise the power of eminent domain directly and in its own name, or may place works of public utility in the charge of private corporations or persons and authorize them to institute and carry to their consummation proceedings seeking the condemnation of property for the use of such works: *Clarke v. City of Rochester*, 24 Barb. 481; *Matter of Kerr*, 42 Id. 121; *Bloomfield N. G. Co. v. Richardson*, 63 Id. 447; *Matter of Townsend*, 39 N. Y. 174; *S. F. & A. & S. R. R. Co. v. Crandall*, 31 Cal. 372; that the legislature can authorize the taking of private property for public uses only, and then only on just compensation being made: *Embury v. Conner*, 3 N. Y. 517; *People v. White*, 11 Barb. 31; *Taylor v. Porter*, 4 Hill, 147; *People v. Supervisors*, 4 Id. 73; that payment need not be made in advance if an adequate remedy is provided by which it may be compelled: *Rexford v. Knight*, 11 N. Y. 313; *People v. Canal Com'rs*, 5 Denio, 404; *Goldmid v. Lewis County Bank*, 7 Barb. 427; *Wallace v. Karlenowefski*, 19 Id. 121; *Gould v. Glass*, Id. 190; *Chapman v. Gates*, 46 Id. 318; 54 N. Y. 144; but if payment in advance is not required, then an adequate fund must be provided, or the statute will be unconstitutional and void: *People v. Mayor of Brooklyn*, 9 Id. 556; *Hartwell v. Armstrong*, 19 Id. 171; *Russell v. Mayor of N. Y.*, 2 Denio, 472; *Lyon v. Jerome*, 26 Wend. 493; *McCauley v. Weller*, 12 Cal. 529; *People v. Hayden*, 6 Hill, 361; *Bensley v. Mountain Lake Co.*, 13 Cal. 318; that a party is entitled to full compensation for property taken or for any interest which he may have therein: *Elevated R. R. case*, 3 Abb. (N. C.) 450; and, therefore, that though the right of way for an ordinary highway may have been acquired, the same land can not be taken for a railway, without further compensation: *Trustees of Pres. So. v. A. & R. R. R. Co.*, 3 Hill, 569; *Fletcher v. Auburn & S. R. R. Co.*, 25 Wend. 464; *People v. Law*, 22 How. Pr. 117; *Davis v. Mayor of N. Y.*, 14 N. Y. 521; *Williams v. N. Y. Cent. R. R.*, 16 Id. 97; that statute authorizing location of a railroad along, near, or across a public highway is such a waiver of the interests of the public as will preclude the maintenance of an indictment for a public nuisance for such locating: *First Baptist Church v. U. & S. R. R. Co.*, 6 Barb. 318; that corporate rights and franchises may, in a proper case, be taken in the exercise of the right of eminent

domain: *West Bridge R. Co. v. Dix*, 6 How. (U. S.) 543; that an entry for the purpose of making preliminary surveys may be authorized, without providing for compensation: *Polly v. Saratoga & W. R. R. Co.*, 9 Barb. 458; *Merritt v. N. R. R. Co.*, 12 Id. 608; that trespass, trover, ejectment, or action on the case for misfeasance may be sustained against a corporation: *Mayor of N. Y. v. Bailey*, 2 Denio, 439; *People v. Ambrecht*, 11 Abb. Pr. 101; *Lucas v. Johnson*, 8 Barb. 249; *Dater v. Troy T. & R. R. Co.*, 2 Hill, 631. In *Matter of Deansville Cemetery Association*, 66 N. Y. 572, it is denied in the principal case, that a legislative grant is conclusive that the objects sanctioned by it constitute a public use.

The cases in this series upon the subject of eminent domain may be found by referring to the notes to *Beekman v. Saratoga & Schenectady R. R. Co.*, 22 Am. Dec. 679, 686; *Wellington's case*, 26 Id. 631, 644; *Matter of Albany street*, 25 Id. 618, 622; *Cooper v. Williams*, 22 Id. 743, and 24 Id. 299; *Harding v. Goodlet*, 24 Id. 546; *Aldridge v. Tuscumbia R. R. Co.*, 23 Id. 307; *Memphis v. Wright*, 27 Id. 489; *Varick v. Smith*, 28 Id. 417, 423.

COMPENSATION WHEN PROPERTY IS TAKEN BY THE GOVERNMENT.—The authorities, at the present time, leave no doubt that the state need not directly exercise the power of eminent domain, but may delegate this power to private individuals and corporations, by authorizing them to take charge of some public work or use, and to prosecute such proceedings as may be required to obtain such lands or franchises as are indispensable to its successful operation. Where the state proceeds in its own name, it is manifestly the one from whom compensation is to proceed. If, on the other hand, the public work is carried on by private persons or corporations, payment must be made by them. The government is generally regarded as solvent and as inclined to deal justly with all its citizens. Private corporations and persons frequently become insolvent, and with like frequency are found not to respect the rights of others, when free to exercise their option. When property is taken directly by the state, there is therefore less reason to insist upon payment in advance or upon the pre-existence of some adequate fund especially appropriated to the payment of the lands condemned or taken. The early state governments made no compensation for lands taken for public roads, because in all sales of lands by them a certain excess was included for road purposes: *State v. Dawson*, 3 Hill (S. C.), 100; *McClenachan v. Curwen*, 6 Binn. 509; *Commonwealth v. Fisher*, 1 P. & W. 462. These cases do not, therefore, show that the state was entitled to withhold compensation, or to make its payment distant or uncertain, but only that in laying out the road it was using what it had expressly reserved for such use. There are several cases commonly cited to show that a state, county, or municipal corporation may take lands without payment in advance, but these cases, when examined, do not really support the right of the state to take lands without payment, except when some adequate fund is provided, out of which payment may be compelled: *Smith v. Taylor*, 34 Tox. 589; *Hatermehl v. Dickerson*, 8 Phila. 282.

Perhaps this remark is not true of *Orr v. Quimby*, 54 N. H. 590. There property had been entered upon and a number of trees felled in prosecuting the work of the United States coast survey. No specific fund existed out of which to make payment. The court found that liberal appropriations had been made by congress from time to time for the advancement of this survey, aggregating several millions of dollars. It then said: "That here was not a definite and certain fund, set apart for the payment of such sum as might be awarded to this plaintiff, may be conceded, but these large appropriations can not be overlooked in determining the question before us, and

we are unable to entertain a doubt that whenever the plaintiff's damages, or those of any other land-owner, shall have been assessed by virtue of the statute under consideration, the sum assessed will be paid without unreasonable delay. That a judgment against an agent of the government, for damages caused by him in executing the requirements of an act of congress, under the direction of the president of the United States, will be promptly satisfied, we hold to be reasonably certain. Whether a reasonable certainty in the opinion of the court that such damages will be promptly adjusted, although there may be no property, nor any definite and certain fund provided to which an injured party can resort if the government should repudiate his claim, is sufficient to relieve the question from constitutional objections, will be considered in another part of this opinion." Here the action was trespass for entering upon land and cutting down trees. The defense was founded upon the statutes of New Hampshire authorizing any person employed under the act of congress of February 10, 1807, and the acts supplemental thereto, to enter upon lands within that state, for the purpose of exploring, surveying, triangulating, leveling, etc. The provision providing for compensation was held by the court not to require payment or assessment of damages in advance. The constitutionality of this statute seems to be upheld by this case; but the court emphasizes the fact that the acts done were not a taking, but only the preliminary acts of entry and survey; and that such acts may unquestionably be authorized without exacting payment in advance. The true rule seems to be, that if property be taken by a state, city, or county, the legislature need not provide for compensation to precede the appropriation, if it makes a provision by which the party injured can obtain compensation, and provides a proper tribunal for determining the amount: *Orr v. Quimby*, 54 N. H. 594; *Ash v. Cummins*, 50 Id. 591; *Dronberger v. Reed*, 11 Ind. 420; *Rudisill v. State*, 40 Id. 485; *Loweree v. City of Newark*, 38 N. J. L. 151; *Powers v. Bears*, 12 Wis. 213. Hence a law is not unconstitutional which authorizes the appropriation and condemnation of property, and the assumption of possession, but postpones the time of payment for a period sufficient to enable a municipal corporation to assess and collect a tax to raise the requisite moneys: *Hamersley v. Mayor of N. Y.*, 56 N. Y. 533; *Hattemehl v. Dickerson*, 8 Phila. 282; *Brock v. Hishen*, 40 Wis. 674. But in California, where proceedings have been taken to procure the right of way for a public road, the rendition of a judgment for the amount to be paid does not of itself divest the land-owner of any interest in his property; and the road master has no authority to proceed to open the road until the amount of the award has been paid or tendered, or a specific sum has been set apart in the treasury to meet such payment: *Brady v. Bronson*, 45 Cal. 642; *Grigsby v. Burnett*, 31 Id. 406; *Murphy v. De Groot*, 44 Id. 51.

THE TEMPORARY OCCUPATION OF PROPERTY for the purpose of making preliminary surveys, may be authorized by the legislature, without exacting that compensation be first assessed and paid: "The constitutional prohibition against taking private property for public use, until compensation is first paid or tendered, means the taking the property from the owner, and actually applying it to the use of the public. It does not mean the preliminary measures necessary in such cases. To hold that compensation must be paid or tendered, before a survey should be made, or other preparatory steps taken, would be a construction of the constitution not required by its language, or necessary for the protection of private rights. It is quite a sufficient protection, if the owner is secured in the use and enjoyment of his property until the damages he may sustain are constitutionally ascertained, and paid or tendered:" *Stearns v. Mayor & City Council of Baltimore*, 7 Md. 516; *Walther v. Warner*, 25 Mo.

289; *Orr v. Quimby*, 54 N. H. 596; *Cushman v. Smith*, 34 Me. 256; *Lebanon v. Olcott*, 1 N. H. 345.

THE MODE OF OBTAINING COMPENSATION for property taken for a public use is subject to legislative control, provided the substantial rights of the injured party be not destroyed. Thus the failure to present his claim at the time provided by the statute may be deemed a conclusive and irrevocable waiver thereof: *Reckner v. Warner*, 22 Ohio St. 275; *Shearer v. Com'rs of Douglas County*, 13 Kans. 145: "The remedy being adequate, and the party allowed to pursue it, it is not unconstitutional to limit the period in which he may resort to it, and to provide that unless he shall take proceedings for the assessment of damages within a specified time, all right thereto shall be barred:" *Simms v. Memphis C. & L. R. R. Co.*, 12 Heisk. 623. The legislature can not provide for payment to be received otherwise than in money, nor postpone the right to payment after the award becomes final: *Butler v. Ravine Road Sewer Co.*, 39 N. J. L. 665. The citizen is entitled to an impartial tribunal to assess the amount of his damages, and to a hearing by it. A statute designating by name three persons to determine the compensation, and giving the land owner no power to object to either nor to appear before them and make proofs, is unconstitutional: *Langford v. Commissioners of Ramsey County*, 16 Minn. 380.

THE COMPENSATION REQUIRED TO BE MADE for property taken in the exercise of the right of eminent domain is pecuniary; it must be in money; the owner can not be compelled to receive something in lieu of money. Hence he can not be paid in certificates payable within two years: *Butler v. Sewer Commissioners*, 39 N. J. L. 665. A statute making no provision for compensation can not be supported on the ground that the legislature deemed the benefits to accrue from the work equivalent to the value of the land taken: *Carson v. Coleman*, 3 Stock. 106. Some of the early cases, in which, however, the question was not necessarily involved, intimate that an act not providing any direct method of compelling compensation, may be constitutional, on the ground that the legislature may be trusted to supply an adequate remedy, in due time, on its attention being called to the defect in the law: *Jerome v. Ross*, 11 Am. Dec. 484. That such is not the law has long been undoubted. The taking of property for a public use is, in effect, its purchase, although the owner is compelled to make the sale. He is not required to trust to the legislature to enact some statute providing means of payment. Before his property can be taken from him on behalf of any private person or corporation, he is entitled to have the amount of the damages assessed, and paid or tendered to him: *Bohlman v. Green Bay & L. P. R. W. Co.*, 30 Wis. 105; *Wheeler v. Essex Public Road*, 39 N. J. L. 291; *Pearson v. Johnson*, 54 Miss. 259; *Thompson v. Grand Gulf R. R. & B. Co.*, 3 How. (Miss.) 240; *City of Chicago v. Barbican*, 80 Ill. 482; *Bensley v. Mountain Lake Co.*, 13 Cal. 318. If there be any case in which the property may be taken before payment, it is one in which an adequate fund is provided and is put in the hands of an agent or depositary who is not a member of or under the control of the person or corporation seeking the property. A statute authorizing possession of property to be taken upon giving bonds to pay such damages as may be awarded is unconstitutional and void: *Sanborn v. Belden*, 51 Cal. 266.

The person seeking a condemnation of property may, upon the award being made, abandon the proceeding and refuse to take or enter upon the property, in which event the land owner loses no property and acquires no right to compensation: *City of Chicago v. Barbican*, 80 Ill. 482; *State v. Graves*, 19 Md. 351; *Merrick v. Mayor of Baltimore*, 43 Id. 219; *Baltimore & S. R. R. v. Nesbit*, 10 How. (U. S.) 395.

CHAMPION ET AL. v. BOSTWICK AND WIFE.

[18 WENDELL, 175.]

PARTNERS, WHO LIABLE AS.—Where three persons run a line of stages between two given points, and divide the line into three parts, each person owning and maintaining all the stock, and having absolute control of his part, but all agree that the moneys received on any part of the whole line shall be put into a common fund, and after deducting the expense of tolls, shall be divided between the three in proportion to the number of miles of the line operated by each, they are, as between themselves and third persons, partners, and are jointly liable for an injury to a passenger happening on any part of the line.

PROPERTY JOINTLY OWNED by the partners is not required to constitute a partnership.

RIGHT TO JOINTLY SHARE PROFITS makes the parties liable as copartners; but there may be cases in which a person receives a compensation for his labor in proportion to the gross profits of a business, without his becoming a copartner.

PARTNERS ARE LIABLE FOR A TORT committed by one of their number, or by his servant or agent, in the prosecution of the partnership business.

CASE by Bostwick and wife for injuries sustained by her through a collision occasioned by the negligence of the driver of a stage-coach in which she had taken passage. This coach was owned by the defendant Dodge, and was driven by one of his employees. The relations between Dodge and his co-defendants are sufficiently disclosed in the opinion of the chancellor. Plaintiffs recovered a verdict. Defendants moved for a new trial, which was refused. They then sued out a writ of error.

B. F. Butler, attorney-general of the United States, and Roger M. Sherman, for the plaintiffs in error.

J. A. Spencer and P. Gridley, for the defendants in error.

WALWORTH, Chancellor. The plaintiffs below have been permitted to recover for an injury sustained by the wife in being run over by the driver of a coach and horses, forming part of a continuous line of stages between Utica and Rochester. The injury took place on a part of the route between Utica and Vernon; and was done by a coach and horses belonging to Dodge, or which had been hired to him by the year, and by a driver in his immediate employ. And the only question for the consideration of this court is, whether the arrangement between the owners of the different parts of the line between Utica and Rochester was such as to render Champion and Ewers liable to third persons for such an injury, as partners of Dodge in this

part of the line. From the nature of the arrangement between the different stage owners, it is very evident that, as between themselves, Dodge alone ought to sustain the loss; and that if the recovery had been against him solely, he would not have been entitled to call upon the stage owners upon other parts of the line for contribution; and in case this recovery against the others is sustained, he would be bound to make good their loss if he were not insolvent.

As between these different stage owners, Stevens, the driver, was clearly the servant of Dodge only. Dodge, therefore, is ultimately liable to them for any injury which they may sustain by the carelessness of his servant while in his employ; to the same extent as if such injury had been occasioned by his own carelessness while driving the coach and horses himself.

I think, however, that the arrangement made between the stage owners, as to the division of the passage money received upon any part of the line, was such as to render them all liable to third persons, as copartners, for such an injury as this; or for any injury to the passengers on any part of the route; and also rendered them liable for any contract made by either of such owners which was directly connected with the receipt of the passage money, or the increase of the profits on any part of the entire route. By the agreement between them the passage money received by either for the transportation of passengers over any part of the line constituted a common fund, out of which the tolls on the whole route were first to be paid, and the residue was then to be divided among the owners of the different parts of the line in proportion to the distances run by each, whether such passage money was received for the transportation of passengers over one part of the line or another.

This division of the whole passage money, after paying out of the same the expenses of the tolls, was a division of the profits of a joint concern, so as to constitute a partnership between themselves as to that fund; to entitle either of them to an account; and to render them liable to third persons as partners as to everything in which the different owners of that fund had a joint or common interest. If Dodge had received the passage money for the transportation of a passenger over his part of the route only, he would have received it for the benefit of the whole concern, as they all had a common interest in the profits of that part of the line. All, therefore, would have been liable to such passenger, as partners in this part of the route, for any damage he might sustain in consequence of a refusal of Dodge

to transport him from Utica to Vernon; or for any injury which might happen to him by the carelessness of Dodge or his driver, or by reason of any defect in the coach or harness or the team. The case would be entirely different if each stage owner was to receive and retain the passage money earned on his part of the line, and to sustain all the expenses thereof; and was only to act as agent of the others in receiving the passage money for them for the transportation of passengers over their parts of the line. In that case there would be no joint interest, and no liability to third persons as partners.

The case of *Wetmore and Cheesebrough v. Baker and Swan*, 9 Johns. 307, does not decide that there was no partnership in that case. As to a part of the transaction there was a partnership, not between the five persons, but between the two firms of W. & C., and B. & S., and Ostrom. Ostrom was to run one part of the route, W. & C. another part, and B. & S. ran the residue of the route. But the expense of extra carriages was to be borne by all of the parties jointly. To this extent there was a copartnership between the three owners of different parts of the route; and all would clearly have been liable to third persons for the line of extra carriages, if any had been necessary. But there was a settlement and an account stated between the three parties to this arrangement, one of the partners in each of the firms of W. & C. and B. & S. being present and agreeing to such liquidation of the accounts. In conformity with which settlement the money then in Albany was to be paid to B. & S.; but it was afterwards received by the firm of W. & C., who were sued by B. & S. for money had and received to their use. The only question, therefore, was, whether the settlement and adjustment of the joint concern by Cheesebrough, the partner of Wetmore in their part of the route, was binding upon such partner. In other words, whether the running of the stages on the whole line was a joint concern between the five individuals as copartners, or a joint concern between Ostrom and the two firms of W. & C. and B. & S. And the court very correctly decided that there was no partnership existing between the five individuals which could interfere with a recovery in that suit.

It is not necessary to constitute a partnership that there should be any property constituting the capital stock which shall be jointly owned by the partners. But the capital may consist in the mere use of property owned by the individual partners separately. It is sufficient to constitute a partnership if the parties agree to have a joint interest in, and to share the

profits and losses arising from the use of property or skill, either separately or combined. Here the capital which each contributed or agreed to contribute to the joint concern, was the horses, carriages, harness, drivers, etc., which were necessary to run his part of the route; and to be fed, repaired, and paid at his own expense. The only debts or expenses for which they were to be jointly liable as between themselves were the tolls upon the whole line; and the joint profits which they were to divide, if any remained after paying the tolls, was the whole passage money received upon the entire line. Although it may be fairly inferred that each party supposed that the expenses of running his part of the line, exclusive of the tolls, would be equal to the distance run by him, it by no means follows that any of them supposed that the actual passage money or profits of the different parts of the line would be in the same proportion; as it is a well-known fact that the number of passengers who travel in public conveyances increase as you approach large market towns, or other places of general resort. The only object of the agreement to divide the passage money earned upon the whole line among the different proprietors, must have been to give to those who run that part of the line where there was the least travel, a portion of the passage money on other parts of the route, as a fair equivalent for their equal contribution of labor and expense for the joint benefit of all. And as all the owners of the line were thus interested in every part of the route, and were liable to the passengers if they were unreasonably detained on the way, I am inclined to think that if the driver of either had refused to carry on the passengers over his part of the line, without any sufficient excuse, either of the other parties who happened to be present might have employed another driver, at the common expense, to proceed with the team to the end of that route, although as between themselves the owner of that part of the line would be bound to pay such extra expense. And the same right would have existed if the driver, by reason of intoxication or otherwise, was incapable of discharging his duty with safety to the passengers. Although the title to the coach and horses for the time being might not be so far vested in the partners as to authorize any of them to take them out of the possession of the general owner himself, under similar circumstances, the passengers might unquestionably be sent on by either of the others at his expense; or at the expense of all the owners of the line who were interested in having it done, if he was unable to pay the expense.

There is a class of cases in which it has been held, that a person who merely receives a compensation for his labor, in proportion to the gross profits of the business in which he is employed, is not a partner with his employer even as to third persons. The distinction appears to be between the stipulation for a compensation proportioned to the profits, and a stipulation for an interest in such profits so as to entitle him to an account as a partner: 1 Rose, 91;¹ a distinction which Lord Eldon says is so thin that he can not state it as settled upon due consideration. But he says it is clearly settled as to third persons, though he regrets it, "that if a man stipulates that as the reward of his labor he shall have, not a specific interest in the business, but a given sum of money, even in proportion to the *quantum* of profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account though having no property in the capital, he is as to third persons a partner; and no arrangement between the parties themselves can prevent it:" *Ex parte Hamper*, Stark's Law of Part. 137. Cary, however, defends the principle upon which this distinction is based. He insists that as the person who is to receive a compensation for his labor in proportion to the profits of the business, without having a specific lien upon such profits to the exclusion of other creditors, it is for their interest that he should be compensated in that way, instead of receiving a fixed compensation whether the business produced profits or otherwise; on the other hand, that if he stipulates for an interest in the profits of the business which would entitle him to an account, and give him a specific lien or a preference in payment over other creditors, and giving him the full benefit of the increased profits of the business without any corresponding risk in case of loss, it would operate unjustly as to other creditors; and therefore, that it is perfectly right in principle, that he should be holden to be liable to third parties as a partner in the latter case but not in the first: Cary on Part. 11, note i. I am inclined to think this distinction is a sound one as regards the rights of third persons. But as between the parties themselves it is perfectly competent for them to agree that one shall have his full share of the anticipated profits as a compensation for his labor or skill, without running any risk of absolute loss, except as to third persons, if instead of producing profits the business should prove a losing concern. Many of the cases cited by the counsel for the plaintiffs in error, were

1. *Ex parte Rowlandson*.

those in which the question arose between the immediate parties to the agreement which was supposed to make them partners as between themselves; and they may therefore be reconciled with other cases in which they were held to be liable as partners to third persons upon the principles before stated.

That one partner is liable in tort for the acts of his copartner in the prosecution of the copartnership business, as well as upon contracts for the benefit of the joint concern, appears to be well settled. And the case of *Wayland v. Elkins*,¹ 1 Stark. 272; S. C., Holt N. P. 227, is in point, to show that each is liable in tort for the negligence of the servant employed and paid by one of them exclusively, by which a third person is injured by such servant while engaged in the business from which both were to derive a profit. If one partner would be liable for the negligence of his copartner in such a case, it seems to be a necessary consequence that he should be liable for the same act if done by the servant of such copartner. In relation to the case of *Barton v. Harrison*,² 2 Taunt. 49, in which it was held that a party jointly interested in a stage coach which was horsed by the proprietors separately on different parts of the line, was not answerable for corn purchased by one of the proprietors for the use of his own horses on his part of the line, Chief Justice Gibbs says, when the case was cited by the counsel for the defendant in *Waland v. Elkins*: "I recollect the case very well, but the decision there turned upon the inferior contract, if I may so term it, between the parties. In that case there was a particular contract between the parties, and it was known in what situation they stood in respect to each other." In other words, it was known in that case, as in this, that the different proprietors were to run their several parts of the line with their own teams and at their own expense; and the plaintiff had furnished one of the proprietors with grain for his horses, knowing that it was for his sole benefit; and as it was furnished on his credit solely, the plaintiff had no just grounds for charging the partnership therewith. It was in fact trusting the individual with a part of the capital which he knew that individual had agreed to contribute to the partnership; and which the other partners are never liable for under such circumstances.

For these reasons, I think there was such a partnership between the plaintiffs in error in relation to the business in which Stevens the driver was engaged, at the time this injury was done, as to render them all liable to the defendants in error for

1. *Waland v. Elkins*.2. *Barton v. Hanson*.

the consequences of his negligence; and that the judgment of the supreme court should be affirmed.

On the question being put, Shall this judgment be reversed? all the members of the court (twenty-four being present), with but two dissenting voices, voted in the negative. Whereupon the judgment of the supreme court was affirmed.

Judgment affirmed.

The principal case may doubtless be regarded as a leading one. It has been cited with approval quite frequently in the subsequent decisions of the courts of the state where it was pronounced. It has often been referred to upon the question of the right to participate in profits making one liable as a partner, and the various rules, exceptions, and distinctions on that subject are often sought to be supported by citing this case: *Dimon v. Delmonico*, 35 Barb. 564; *Heimstreit v. Howland*, 5 Denio, 70; *Hodgman v. Smith*, 13 Barb. 304; *Catskill Bank v. Gray*, 14 Id. 476; *Cummings v. Mills*, 1 Daly, 522; *Cotter v. Bettner*, 1 Bosw. 493, 494; *Penny v. Black*, 9 Id. 315; *Cushman v. Bailey*, 1 Hill, 527; *M. & H. R. R. Co. v. Niles*, 3 Id. 164; *Ontario Bank v. Hennessey*, 48 N. Y. 553; *Leggett v. Hyde*, 58 Id. 279; *Smith v. Wright*, 1 Abb. Pr. 246; *Pattison v. Blanchard*, 6 Barb. 541. We shall not undertake to state these distinctions; for, in truth, we have never been able to comprehend them; nor to determine with any confidence whether the facts of a particular case showed the existence of a right to share profits as profits or as something else. In this series the cases of *Brown v. Higginbotham*, 27 Am. Dec. 618; *Miller v. Hughes*, 10 Id. 719; *Simpson v. Feltz*, 16 Id. 602; *Dob v. Halsey*, 8 Id. 293, relate to this question. In *Merrick v. Gordon*, 20 N. Y. 95, the principal case is distinguished from the one under consideration; and in *Pattison v. Blanchard*, 5 Id. 189, it is stated that the circumstances of the principal case do not make the participants partners as between one another. Common carriers are liable for damages occasioned by the negligence of their servants: *Townsend v. Bogart*, 11 Abb. Pr. 363, citing the principal case.

CHAMPLIN ET AL. v. LAYTIN.

[18 WENDELL, 407.]

MERE MISTAKE OF LAW is not, in the absence of fraud, surprise, or undue influence, a sufficient ground for relief in equity. *Per* Bronson, J.

THE PRESUMPTION IS, THAT EVERY MAN UNDERSTANDS HIS LEGAL RIGHTS, provided he has full knowledge of the facts.

MONEY PAID UNDER FULL KNOWLEDGE OF THE FACTS can not be recovered on the ground that the payor was ignorant of the law. *Per* Bronson, J.

MISTAKE OF FACT OCCASIONED BY ACTING ON THE REPRESENTATIONS OF ANOTHER, which representations were in turn occasioned by a mistake of law, is sufficient ground for relief in equity from a contract entered into with the person making the representations, and on the faith thereof.

MISTAKE OF LAW ON THE PART OF BOTH CONTRACTING PARTIES, owing to which the object of their contract can not be attained, is sufficient ground for setting aside such contract. *Per* Paige, Senator.

DISTINCTION BETWEEN MISTAKE OF LAW AND IGNORANCE THEREOF, maintained. Per Paige, Senator.

CONSTRUCTIVE NOTICE OF CONTENTS OF A DEED BECAUSE KNOWN TO ONE'S AGENT is not implied in favor of a vendor and against a vendee, so as to preclude the latter from relief from his contract with the former.

BILL in chancery by Champlin and others, as executors of Depeyster, to foreclose two mortgages. Cross-bill by defendants for the cancellation of the mortgages, and refunding moneys already paid. The mortgaged premises were, in 1828, sold by complainants to defendant. The other facts sufficiently appear from the opinions. Complainant's bill was dismissed, and the prayer of the cross-bill granted. They therefore appealed.

H. W. Warner, and B. F. Butler, attorney-general of the United States, for the appellants.

M. Hoffman and F. B. Cutting, for the respondent.

BRONSON, J. Fifth street, running from Broadway to Mercer street through lands owned by the testatrix, Elizabeth Depeyster, was laid down on a map made for the corporation of the city of New York in the year 1817. In 1821, the appellants caused a map of the lands of the testatrix to be made, on which Fifth street was laid down to correspond with the city map. They afterwards made sales in pursuance of this survey, and in January, 1822, they sold and conveyed a lot to Samuel Whittemore, extending from Broadway to Mercer street, and which, by the terms of the deed, was bounded on one side for the whole distance by Fifth street. According to the decision in the case of *Mercer Street*, 4 Cow. 542, this did not amount to an implied grant of a right of way to the purchaser over the proposed street, but the appellants, when the street should be opened, would be entitled to be paid the full value of the land, without regard to the supposed easement. This case was decided in 1825. The appellants, acting on the belief that the sale to Whittemore had not affected their interest in the land required for the proposed street, surveyed the same into lots, and in January, 1828, sold and conveyed to the respondent the two lots which are the subject of controversy in this suit. In the case of *Lewis Street*, 2 Wend. 472, decided in 1829, the case of *Mercer Street* was reconsidered and overruled; and the principle of the last decision has been approved by this court in *Livingston v. The Mayor of New York*, 8 Id. 85 [22 Am. Dec. 622], and in *Wyman v. The Mayor of New York*, 11 Id. 486. After the decision in the case of *Lewis Street*, the corporation of

the city ordered Fifth street to be opened, and the respondent has only been allowed a nominal consideration for his two lots, on the ground that the previous acts of the appellants in selling and bounding lots on the street, amounted to the grant of a perpetual easement or right of way over the land. Before the conveyance to the respondent was executed, he was informed that the two lots lay in the site of the proposed street. Both parties entertained the belief that the respondent would acquire a perfect title to the lots, and should the street be opened, that he would be entitled to receive full compensation for the land, without prejudice from any previous act of the appellants. In that, the parties were mistaken; and this has led to the discussion of the question, whether the respondent was entitled to relief on the ground of a mistake in matter of law. The vice-chancellor was of opinion that equitable relief might be granted on that ground, and has decreed it accordingly. The chancellor has affirmed the decree, but for a different reason. There is nothing in the point made by the respondent, that the court below was authorized to grant relief on the ground of a breach of the covenant in the deed. If there has been any breach, the remedy of the respondent was by action at law to recover damages; not by bill in equity.

Courts of equity may grant relief against acts done and contracts executed under mistake, or in ignorance of material facts; but it is otherwise, I think, where a party wishes to avoid his act or deed, on the ground that he was ignorant of the law. All men are presumed to know the law of the land; and although the presumption may often be at variance with the fact, it is impossible, without indulging it, to maintain the order or the institutions of society. The maxim, *ignorantia legis non excusat*, is uniformly applied in the administration of criminal laws, and I am at a loss to conceive why the fitness of the rule should ever have been doubted in civil cases. It surely can not be more important to protect men in the enjoyment of their estates, than it is to save them from ignominious punishments; and yet there some few cases in the books which either directly favor the opinion, that relief may be granted on the ground of ignorance or mistake in matter of law, or where the courts have been so solicitous to reach what has been deemed the equity of a particular case, that they have proceeded upon distinctions too subtle for practical utility. The landmarks of the law should be drawn in striking characters. It is better that a general rule should be denied at once than to admit its existence, and mul-

tiply exceptions until its practical influence is no longer felt. The common law does not profess to give the best rule for every possible case that may arise; but only such general rules as have, from long experience, been found on the whole best adapted to the wants and well-being of society. Questions will sometimes arise where the principles of the common law will come short of administering what may seem the most obvious equity; but it is better that the hardship of a particular case should be endured, than to think of multiplying legal regulations, until they shall become as infinitely diversified as are the affairs of men. I am persuaded that more mischief has been done by attempting to mold the law to what has seemed the natural justice of a particular case, than could have resulted from a steady and firm adherence to those general principles which lie at the foundation of our jurisprudence.

The rule, that every man who has a full knowledge of the facts is presumed to understand his legal rights, is as much respected in courts of equity as it is at law: Vin. Abr., tit. Chancery, N; Com. Dig., tit. Chancery, 3 F, 8; *Hunt v. Rousmaniere*, 1 Pet. 1; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Lyon v. Richmond*, 2 Id. 51; *Storrs v. Barker*, 6 Id. 166 [10 Am. Dec. 316]; 1 Madd. Ch. 73; 1 Story Eq. 121.

Without intending a general review of the cases on this subject, I shall notice some of those which are supposed to have the most important bearing in favor of the respondent. In *Lansdown v. Lansdown*, Mose. 364, the second of four brothers died, and the eldest and the youngest both claimed his estate. They referred the question to a school-master, who decided that the youngest was entitled to the property, because lands could not ascend. Upon this, the parties agreed to divide the estate between them, and the eldest brother executed a release. The chancellor decreed that the deed should be delivered up, "being obtained by mistake and misrepresentation." The facts are so briefly stated, that it is impossible to say with certainty on what ground the decision proceeded. If there was any intentional misrepresentation, either about the facts or the law of the case, that would be a proper ground for affording relief; and it is stated in a report of the case, 2 Jac. & W. 205, that the complainant alleged in his bill that he had been surprised and imposed upon by his brother and the school-master. In the report by Moseley, Lord Chancellor King is made to say that the maxim of law, *ignorantia juris non excusat*, was in regard to the public; that ignorance can not be pleaded in excuse

of crimes, but did not hold in civil cases. Moseley is not a book of very high authority: 5 Burr. 2629;¹ 3 Anstr. 861;² and I think it much more probable that the case turned on the ground of surprise and imposition, than that the chancellor made use of the language imputed to him. Chief Justice Marshall cited this case in *Hunt v. Rousmaniere*, when first before the court, 8 Wheat. 214, with the qualifying remark, "if it be law;" and he added, that there were certainly strong objections to the decision. Mr. Justice Story, in commenting on the language imputed to Lord Chancellor King, says, it is utterly irreconcilable with the well-established doctrine, both of courts of law and courts of equity. He adds, the general rule certainly is, that a mistake of the law is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision: 1 Story Eq. 129.

The case of *Brigham v. Brigham*,³ 1 Ves. sen. 126, and Belt's Supp. 79, is supposed to have an important bearing on the question. The plaintiff had purchased an estate which already belonged to him, and it was decreed that the defendant should refund the purchase money. This is the substance of the case as stated by Vesey. Mr. Belt adds, the bill stated that the plaintiff was persuaded by the defendant and his scrivener and conveyancer, that Daniel had no power to make the devise on which the title of the plaintiff depended. To this the defendant responded, that the plaintiff should have been better advised before he parted with his money. If active means were employed by the defendant to mislead the plaintiff in relation to his legal rights, that may have furnished a very proper ground for granting relief. After the defendant had employed a scrivener and conveyancer to persuade the plaintiff that he had no title, it certainly was not a very good answer to tell the plaintiff he had confided too credulously in their representation, and should have been better advised before he parted with his money. On whatever ground the case may have turned, it does not appear that Lord Hardwicke thought he could grant relief, merely on the ground that the party had mistaken the law of the land. As to the case of *Willan v. Willan*, 16 Ves. 72, it is only necessary to read the depositions of Dr. Kirkland, the physician, and Mrs. Willan, the widow of the testator, to show that there were very good grounds for interfering in that case,

1. *Quantoock v. England*.2. *Rootham v. Dawson*.3. *Bingham v. Bingham*.

without touching the principle that every man, in the full enjoyment of his mental faculties, and in the absence of all undue influence, is presumed to know the law of the land.

In *Pusey v. Desbouvrie*, 3 P. Wms. 315, the daughter made her election to take the legacy in ignorance of the fact how much her orphanage portion would amount to; and besides, the case was never finally decided, but was agreed between the parties, as appears from the register's book. The case of *Edwards v. McLeay*, Coop. Ch. Cas. 308, was decided on the ground of fraud. *Evans v. Llewellyn*, 2 Bro. Ch. 150, more fully reported in 1 Cox Ch. Cas. 333, will be found to rest on peculiar grounds, not affecting the question under consideration.

I do not think it necessary to mention other cases cited on the argument, which have a less important bearing in favor of the respondent than those already considered. Unless the case in *Moseley* is an exception, I think there is no one in the English books which affirms the doctrine that mere mistake in matter of law, in the absence of all fraud, surprise, circumvention, and undue influence, furnishes a sufficient ground for setting aside a contract, or otherwise relieving a party from the legal consequences of his acts.

The civilians are divided on the question, whether money paid under a mistake of law is liable to repetition. But it is the settled doctrine of Westminster hall that money paid, with a full knowledge of the facts, can not be recovered back, on the ground that the party was ignorant of the law: *Bilbie v. Lumley*, 2 East, 469; *Lowry v. Bourdieu*, Doug. 467,¹ per Buller, J.; *Stevens v. Lynch*, 12 East, 38; *Brisbane v. Dacres*, 5 Taunt. 144. Such, also, is the rule in this state: *Clark v. Dutcher*. 9 Cow. 674.

In *Fitzgerald v. Peek*,² 4 Litt. (Ky.) 125, it was said that even for mistakes of law, relief may be granted in some cases. The same doctrine was asserted in *Lowndes v. Chisolm*, 2 McCord (S. C.) 455 [16 Am. Dec. 667]. *Lawrence v. Beaubien*, 2 Bail. (S. C.) 623 [23 Am. Dec. 155], is the only case I have met with where a distinction was attempted between ignorance and mistake of the law, and holding that in the latter case, though not in the former, relief might be granted. I think the distinction rests on no solid foundation. Whether money paid in ignorance of the law could be recovered back, was elaborately discussed by the counsel in *Haven v. Foster*, 9 Pick. 112 [19 Am. Dec. 353]; but the decision turned upon another point. The

1. 1 Doug. 468.2. *Fitzgerald v. Peek*.

court, however, assert the principle, as applicable alike to civil and criminal proceedings, that every man is presumed to know the law of the land: *Wheaton v. Wheaton*, 9 Conn. 96, and *Hunt v. Rousmaniere*, 1 Pet. 1, both affirm the doctrine that a party can not be relieved on the ground of mistake in matter of law.

The principles of the common law have been followed more closely in this than they have in some of the other states; and our courts have never held but one language on this question. In *Shotwell v. Murray*, 1 Johns. Ch. 512, the chancellor said it was a settled principle of law and sound policy, that a person can not be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts. He added that ignorance of the law was a very dangerous plea, whether we apply it to the rules of civil conduct, or to duties of natural and moral obligation. And he denied relief, on the ground that the plaintiff was only under a mistake in point of law, which mistake was not produced by any fraud in the defendant. *Lyon v. Richmond*, 2 Johns. Ch. 51, is another direct decision on the point. The chancellor says, courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. He adverts to a feature in that case much like the one which has given rise to this controversy, and remarks, that to permit a subsequent judicial decision in any one given case on a point of law, to open or annul everything that has been done in other cases of the like kind for years before, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such precedent to be found. This case was reversed in error: 14 Johns. 501; but it was on grounds which left the principle laid down by the chancellor untouched. In *Storrs v. Barker*, 6 Johns. Ch. 166 [10 Am. Dec. 316], the same doctrine was again asserted; and in *Clark v. Dutcher*, 9 Cow. 674, the question, whether money paid under a mistake of law, but with full knowledge of the facts, could be recovered back, was very fully considered by the supreme court, and decided in the negative.

It is impossible to foresee all the consequences which would result from allowing men to avoid their acts and annul their contracts on the plea that they did not understand the law.

Who can tell what titles would stand, or what contracts could be enforced, if grantors and obligors were at liberty to set up this plea? Who would venture to enter into stipulations with another, if after having dealt fairly in relation to the facts of the case, the validity of the contract still depended on the legal knowledge of the opposite party? And what possible reason can there be for indulging the plea of ignorance in civil cases, when it is wholly disregarded in criminal trials, where liberty and life itself are at stake? Should we sanction this doctrine under the notion of administering equity in a hard case, it could not, I think, fail to open the flood-gates of litigation, and work the most mischievous consequences in the administration of justice.

Having arrived at the conclusion that the respondent was not entitled to relief on the grounds of a mistake of the law, it becomes necessary to inquire a little more particularly into the facts of the case. I have said already that both parties acted under the influence of a mistake; but what was the nature of the error under which they respectively acted, remains to be more fully considered. It is not denied that the appellants were as fully informed at the time of the sale of every material fact connected with the origin of this controversy as they are at the present moment. They knew of the city map made in 1817, and their own map, under which sales were made in 1822. They knew, also, that they had conveyed land to Whittemore, bounding him on Fifth street, for the whole distance from Broadway to Mercer street. With the knowledge of all these facts they say, and I doubt not say truly, that they believed they had done no act affecting their beneficial interest in the land over which Fifth street was laid, and should the street be opened, they supposed the purchaser would be entitled to full compensation for the land. They erred in drawing the proper legal conclusion from facts within their knowledge—they mistook the law.

What was the error of the respondent Laytin? Mr. Herring was the active executor, and transacted the whole business on the part of the appellants. He attended and directed the sale, and made all the representations in relation to the title and circumstances of the property. He admits that he stated his opinion to Laytin, that the title was perfect, that the appellants were seised of the lots in fee, clear of all incumbrances and charges, and that the lots could not be taken for the purpose of opening the street, without allowing the full value of the

land. He told Mr. Fitch, the counsel of Laytin, that if the street was ever opened, Laytin would be paid for it by the corporation. Wyman swears that Herring, at the time of the sale, represented that the title was perfect, and free from incumbrance. Moses, who also purchased at the same time, swears that Herring told him it was useless to employ counsel to examine the title—that he had himself examined, and the title was perfectly good—that there was no incumbrance whatever upon the land. How would these representations be understood by a person unacquainted with the facts? How would the purchaser have a right to understand them? So far as related to the seisin of the testatrix, the representations ought perhaps to have been regarded as the mere expression of an opinion concerning the validity of the title; but in relation to the acts of the appellants themselves, the representations would most obviously be understood, not as matter of opinion merely, but as an affirmation that they had done no act which could prejudice the purchaser in the beneficial enjoyment of the property. The representation that the lots could not be taken by the corporation for the purpose of opening the street without paying full value for the land, whatever other idea was included in it, would naturally be understood by the purchaser as an assurance that the appellants had not themselves done any act which would preclude him from demanding full compensation. To this extent, at least, Laytin had a right to understand Herring as speaking of the facts of the case. Herring did not state what the facts were, and then declare his opinion on the matter of law. Had he done so, the parties would then have stood on equal terms, and must have abided the consequences of their mutual error.

If I am right in this view of the case, it follows that the mistake under which Laytin entered into the contract, was one of fact, and not of law. He did not err in drawing legal conclusions from facts within his knowledge, and is not driven to that ground in seeking relief. He trusted to representations which he had a right to understand as relating to the facts of the case, and which, though innocently made, have turned out to be false and deceptive.

But it is said that the respondent, before the conveyances were executed, had notice of all the material facts. If this be true, he is now too late in asking relief, and must abide the consequences of his own misjudgment. But the allegation of notice is not, I think, well founded. At the time the respond-

ent bid off the lots he knew nothing about the street; but before the conveyances were executed, he saw the map of 1821, and knew that the lots were in the site of the proposed street. So far as that fact goes, he acted with his eyes open, and can not now complain. But did he know of the deed to Whittemore, and its contents? It was of little moment that the appellants had made a map, laying down a street over their land. That would not authorize the corporation of the city to take the land without paying its full value. The owners might abandon their map at pleasure, and sell or build on the land in the same manner as though nothing had been done; but after they had made sales in reference to the map, and in terms bounded the purchaser on the street, they had created a servitude in the land, and were then too late to abandon the map. On opening the street they were only entitled to a nominal compensation—their whole beneficial interest in the land was at an end. The fact that they had sold lots in reference to the proposed street, was in the highest degree important to the respondent. He had a right to that information, that he might judge for himself, or consult counsel, in relation to the legal consequences of such an act.

Had the respondent notice of the Whittemore deed, and its contents? The appellants in their answer do not allege that they gave him any information concerning it. The answer only states that the appellants have reason to believe, and do believe, that the respondent had notice of the deed. They give the reason for this belief, and say they are informed and expect to prove that Fitch, the respondent's counsel, made an abstract of the title, in which the Whittemore deed was conspicuously noted. There is no pretense in the answer that the respondent came to the knowledge of the deed or its contents in any other way. How then does this question stand on the testimony of Mr. Fitch? When first called, he had mislaid his papers, and said nothing about the abstract. On a second examination, he says, that in the register's certificate annexed to his notes of searches, the Whittemore deed is mentioned, and he gives a copy of the short note made by the register, in which the lot was described as "No. 7 Depeyster's map." He adds, that he does not remember examining the deeds—he thinks it very doubtful whether he did, for he saw that number on the map, and it was not the property he was searching for. He says further, that he has no recollection of having examined the records of any of the deeds referred to by the register. He

thinks he did not. It is impossible on the testimony of Mr. Fitch to say that he examined the deed or the record of it. He learned that the appellants had conveyed a lot to Whittemore, but it was not the land which had been sold to his client; he did not take the trouble to look into the deed to see what collateral matters it might contain. The fact did not come to his knowledge, that by the terms of the conveyance, Whittemore was bounded on the street. It is true that on looking at the Depeyster map he would see that lot number seven lay adjoining the street; but that would not be likely to awaken his attention to the legal consequences which might follow, as would the knowledge of the fact that the appellants had by their deed solemnly recognized the street. The appellants withheld important information from the purchaser, and made representations on which he had a right to repose—they used language which he could not but regard as an assurance that they had done no act which could affect his beneficial interest in the property—none which could prejudice his claim to full compensation for the land, should the street be opened. In such a case they should be held to strict proof on the question of notice.

This is not a case for applying the doctrine of constructive notice. As between the purchaser of an estate and a third person claiming an equitable interest in the property, the purchaser may, under certain circumstances, be charged with implied notice of the contents of the deed, whether he examined it or not; and he may also be chargeable with notice of a fact which came to the knowledge of his attorney or agent for making the purchase. But the Whittemore deed was not one of the links in the chain of title which Laytin was investigating, and I do not see how any one could charge him with constructive notice of its contents. But it clearly does not lie with the appellants to set up this doctrine. After withholding important information within their knowledge and making representations directly calculated to mislead the party with whom they were contracting, the least that can be required of them is, to make out actual notice.

This then is a case where the parties have bargained under a mutual mistake, going to the essence of the contract. The error of the appellants was one of law; but the mistake of the party seeking relief was in a matter of fact. He had no knowledge of an act done by the other party which had destroyed the whole value of the property. He purchased under a misrepresenta-

tion, which, however innocently made, operated as a fraud upon him. It is against conscience for those who led him into the error to insist on the fruits of the contract. Actual fraud is not necessary in such a case to entitle the party to relief in a court of equity: *Leonard v. Leonard*, 2 Ball. & B. 171; *Glassell v. Thomas*, 3 Leigh (Va.) 113; *Hitchcock v. Giddings*, 4 Price, 135; 1 Story Eq. 157, 158, 160; 2 Kent Com. 470, 471. *Rosevelt v. Fulton*, 2 Cow. 129, was decided by this court. Fulton purchased a tract of land of Roosevelt, both parties believing that it contained a valuable coal mine. Woodworth, J., who delivered the opinion of the court, said: "As it is evident the inducement of Fulton to contract was a belief in the existence of a valuable coal mine, if it shall appear that he relied on a state of facts disclosed by the appellant which are found to be untrue, I apprehend it is not material whether the intent was fraudulent, or the representation proceeded from misapprehension or mistake," and he adds, "in the words of Chancellor Kent, in *Gillespie v. Moon*, 2 Johns. Ch. 596 [7 Am. Dec. 559], that it appears to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded in mistake or fraud." In the case under consideration, the inducement of the respondent for completing the purchase after he learned that the land lay in the site of the proposed street, was the belief that no act had been done which would authorize the corporation to take the land without paying its value; he relied on representations of the appellants, which have proved to be untrue. The whole inducement for completing the purchase has as utterly failed as though he had expected to obtain a coal mine which in truth had no existence.

I think the decree of the court of chancery should be affirmed.

PAIGE, Senator. I am prepared to assent to the proposition of the vice-chancellor, that a contract entered into under an actual mutual mistake of the law on the part of both the contracting parties, by which the object and end of their contract, according to its intent and meaning, can not be accomplished, is as liable to be set aside as a contract founded in mistake of matters of fact. The proper distinction, in my judgment, is taken in the case of *Lawrence v. Beaubien*, 2 Bail. (S. C.) 623 [23 Am. Dec. 155]; *Lownds v. Chisolm*, 2 McCord (S. C.), 455 (1827) [16 Am. Dec. 667]; and *Ex'rs of Hopkins v. Maryck*,¹ 1 Hill Ch. Cas. (S. C.) 250 (1833), between a mistake

1. *Ex'rs of Hopkins v. Maryck*.

of the law and a mere ignorance of the law. This question, it seems to me, was in these cases correctly decided. Several of the cases from the English reports, cited on the argument, were cases where relief was granted against mere mistakes of law; such were the cases of *Willan v. Willan*, 16 Ves. 72; *Bingham v. Bingham*, 1 Ves. sen. 126; *Pusey v. Desbouvrie*, 3 P. Wms. 320; *Landsdown v. Landsdown*, Mose. 364. The cases of *Onions v. Tyrer*, 1 P. Wms. 345, and *Perrott v. Perrott*, 14 East, 439, also recognize the principle that relief may be afforded in cases of mere mistakes of law. The case of *Naylor v. Wench*, 1 Sim. & Stu. 561, is to the same effect. So is the case of *Fitzgerald v. Peck*, 4 Litt. (Ky.) 127. I can not see any good sense in the distinction of granting relief against mistakes of fact, and refusing it in cases of acknowledged mistakes of law. Both, in my judgment, ought to be placed on the same footing. If the principles of justice require relief in the one case, they equally do in the other. The vice-chancellor, Sir John Leach, in *Naylor v. Wench*,¹ 1 Sim. & Stu. 555, says: "If a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake."

Although the case of *Hunt v. Rousmaniere* ultimately turned on another question, 1 Pet. (U. S.) 13, yet the opinion of Chief Justice Marshall in that case, as reported in 8 Wheat. 205, clearly shows which way was the inclination of his mind. He says, speaking of the case of *Landsdown v. Landsdown*, Mose. 364, "that, as a case in which relief has been granted on a mistake in law, can not be entirely disregarded." And he further says: "Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." And again, p. 216, he says, "We are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say a court of equity is incapable of affording relief." And Washington, J., in the same case, 1 Pet. 15, in the conclusion of his opinion, says: "It is not the intention of the court to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law." Johnson, J., in *Lawrence v. Beaubien*, 2 Bail. 623 [23 Am. Dec. 155], says: "All the

1. *Naylor v. Wench*.

difficulty and confusion which have grown out of the application of the maxim, *ignorantia juris neminem excusat*, appear to me to have originated in confounding the terms ignorance and mistake. The former is passive and does not presume to reason, but the latter presumes to know when it does not, and supplies palpable evidence of its existence." He further says, in *Ex'rs of Hopkins v. Mazyck*, that a mere ignorance of the law is not susceptible of proof, and therefore can not be relieved; but that a mistake of law may be proved, and when proved, relief may be afforded. If relief was to be granted upon every allegation of a mere ignorance of the law, great embarrassments would arise in discriminating between the cases of actual ignorance and those of feigned ignorance. So where the ignorance or mistake of the law is only in one of the contracting parties, and the other party has not taken any advantage of the circumstance in making the contract, it would not be proper to grant relief against such ignorance or mistake; but where a contract is entered into under an actual and reciprocal mistake of law in both the contracting parties, by which the manifest intention of the parties can not be accomplished, and which *ex æquo et bono* ought not to be binding, and where such mistake is either acknowledged, or undoubted evidence of it is produced, I can not see any good reason why relief should not be granted in equity to the same extent as is done in cases of mistakes in matter of fact. The principles of natural justice require that the like relief should be granted in both cases. I would qualify the rule, however, as was done by Johnson, J., in *Lawrence v. Beaubien*, and deny relief, if it appeared the contract was the compromise of a doubtful right, or was entered into as a speculating bargain. By adopting the rule with these qualifications, in my judgment, no mischievous consequences would follow, but on the contrary, the interests of justice would be advanced.

If, therefore, the mistake of the contracting parties in this case was one of law merely, I am nevertheless of opinion that the decree of the court of chancery ought to be affirmed. But I am inclined to believe that the purchaser, Laytin, is also entitled to relief upon the ground of a mistake on his part in matters of fact, the ground upon which the chancellor placed his decision. I can see no error in the decree appealed from, and I am therefore for affirming it.

Senator Tracy said that he should vote for an affirmance of the decree, on the ground of the breach of the covenant contained in the deed executed by the appellants, that they had not

done, committed, or suffered any act whereby to charge or incumber the premises.

On the question being put, Shall this decree be reversed? all the members of the court (twenty-seven being present) voted in the negative. Whereupon the decree of the chancellor was unanimously affirmed.

The distinction between a mistake and an ignorance of law is sought to be maintained in *Lawrence v. Beaubien*, 23 Am. Dec. 155. In the note to that case, we endeavored to show the extent to which it had found favor in the courts of other states. In the principal case, it seems to have met the approval of Senator Paige, and the condemnation of Judge Bronson. The learned judge, while unwilling to concede that a mere mistake of law can be a ground of relief, did indirectly permit it to operate with such force as to control his final judgment, and to lead him to accord relief, because, as he said, a mistake of law had resulted in a mistake of fact, and brought one of the parties to assent to a contract which, but for such mistake, would not have met his approval. The subsequent decisions in New York seem not to accord with the views of Senator Paige: *Holdridge v. Webb*, 64 Barb. 72; *Jacobs v. Morange*, 47 N. Y. 61; but we have met with no subsequent case in that state in which the question is discussed with any considerable force of logic or industry of research.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

NEWBY, EX'R OF LAYDEN, v. SKINNER ET AL.

[1 DEVEREUX & BATTLE EQ. 488.]

PERSONAL ESTATE OF A DECEASED PERSON is the fund first liable for the payment of his debts.

DIRECTION THAT LANDS BE CONVERTED INTO MONEY and the proceeds divided between certain persons, creates no charge upon the fund for the payment of debts; but the beneficiaries take as devisees, and their bequests will be liable for the testator's debts only after the exhaustion of the personal estate.

COURT OF EQUITY PROCEEDING IN THE SETTLEMENT OF AN ESTATE, will pass upon such incidental questions as what are the proper commissions of an executor, though these standing alone would not afford proper basis for its jurisdiction.

BILL in equity by the executor of William Layden, brought to obtain the advice of the court as to the distribution of funds of Layden's estate in his hands. Layden, by his last will and testament, amongst other provisions, directed that the Broad Neck tract of land should be first rented for the benefit of his estate for the term of two years, then to be sold and the proceeds divided between his daughters Mary Jane and Eliza Curtis. The instrument also bequeathed specific legacies to several persons, amongst whom was Joseph Layden, testator's minor son. In the settlement of the estate the residuary personal estate was exhausted, and it became necessary to effect a full settlement, that recourse should be had either to the proceeds of the sale of the Broad Neck tract or else to the specific legacies. The daughters contended that they were entitled to the undiminished proceeds of the sale; whereas, on the part of the minor son, it was contended, that the bequest to the daughters was in

the nature of a pecuniary legacy, and therefore liable for testator's debts in advance of the specific legacies. The advice of the court was therefore sought.

Kinney, for Joseph Layden.

Devereux, for the daughters.

GASTON, J. (after stating the case). In our opinion, the daughters have clearly the right in this controversy. The general rule is indisputable, that the personal estate is the first and natural fund for the payment of debts, and the real estate is not to be made liable thereto, except to supply the deficiency of the personal. It is sought, in this case, to subject the proceeds of the land devised to the daughters, because by the direction of the testator to sell the land, he turned it, in the contemplation of a court of equity, into personalty, and made it a part of his general personal estate. This position, to the extent to which it is pressed, is untenable. The real estate directed to be sold, was, at the time of the testator's death, land. By the will it was to remain land until sold, and it was directed to be sold only for the convenience of division between the devisees. It was impressed with the character of personalty so far as was necessary to effectuate the testator's purpose, but no further. Every person taking an interest under a will, in the produce of land directed to be sold, is in truth a devisee, and not a legatee. As he takes from the bounty of the devisor, he must receive what is given, in the quality which the devisor has impressed upon it. The devisor has given, not the land, but the price of land; and although the trustee is not bound to sell, if the *cestui que trust* will take the land itself, yet the land in the hand of the *cestui que trust*, is, in equity, regarded as personalty; and if he die without any act to change its quality, it is personalty as between his heir and executor. The devisor might, if he pleased (see *Kidney v. Cosmaker*,¹ 1 Ves. jun. 436, and 2 Id. 267), have converted the land into money out and out, and then, from the whole context of the will, it would have been open for consideration, whether it was made an auxiliary fund for the payment of debts, or was thrown into the ordinary fund as a part thereof; or constituted the primary fund in exoneration of the personal estate. But even in these cases, the executors take as devisees; it is not strictly a part of the testator's general personal estate, but real assets, applicable in their hands to the payment of debts, because devised to them in trust

1. *Kidney v. Cosmaker*.

to be so applied. And in England, however it may be with us, the proceeds of land so converted are held to be equitable, and not legal assets: *Barker v. May*, 9 Barn. & Cress. 489; 17 Eng. Com. L. 426.¹ But a conversion of land into money, directed for the benefit of the devisees, creates no charge upon the land for the payment of debts, and does not make the proceeds either legal or equitable assets, in the hands of an executor. He holds these proceeds simply as a trustee for the devisees: *Gibbs v. Angier*, 12 Ves. 413;² and see *Smith v. Claxton*, 4 Madd. 484.

The bill submits to the court also the *quantum* of commissions to which the executor is entitled. The ordinary tribunal for deciding on such a question, is the county court, and although when a court of equity is resorted to for the settlement of an estate, it may, as incidental to the exercise of this jurisdiction, determine that question also, it ought to have the materials before it, as far as practicable, to enable it to form an advised judgment. We should require for that purpose, an examination by a commissioner, of the nature and quality of the services rendered by the executor, and a report from him, before we acted upon the subject. This has not been moved for, and we should not direct it without a motion. It will produce costs which neither party may be willing to incur.

It is highly probable that the declaration of our opinion on the main question in controversy, will enable the parties to come to a complete settlement. If it should not, either party may hereafter move in the cause as he may be advised.

By COURT. Declare accordingly.

Cited to the point that where by a will real estate is directed to be sold, and the proceeds paid over to legatees, the fund so created is liable to the discharge of debts only upon the exhaustion of the other personalty: *State v. Vinson*, 63 N. C. 365.

PERSONAL ESTATE is the fund first liable for the payment of a decedent's debts: *Robards v. Wortham*, 22 Am. Dec. 738, and cases cited in note.

BAIRD v. BAIRD'S HEIRS.

[1 DEVEREUX & BATTLE Eq. 524.]

PURCHASE AT EXECUTION SALE, BY ONE CO-TENANT of the estate of the other, is valid, and raises no resulting trust in the purchaser in behalf of the vendor.

1. 17 Eng. Com. L. 223.

2. *Gibbs v. Angier*.

EXCLUSIVE POSSESSION OF ONE TENANT IN COMMON, under a conveyance of his co-tenant's estate, though the conveyance is ineffectual, added to the fact that he notoriously claims the whole estate in severalty, constitutes an adverse possession which length of time will ripen into indefeasible title.

PARTNERS ARE JOINT TENANTS, and not tenants in common, of lands purchased with partnership funds.

PARTITION CAN NOT BE HAD OF LANDS PURCHASED WITH PARTNERSHIP FUNDS, and held as partnership assets, prior to a settlement of the partnership accounts.

PARTNER CAN NOT HAVE PARTIAL ACCOUNT; but accounts between partners must embrace all partnership transactions.

ALLEGATION THAT A SALE WAS UNJUST, INIQUITOUS, and fraudulent, is impertinent if not accompanied with a statement of the facts, showing wherein the fraud and iniquity consisted.

BILL in equity. Complainant, Beden Baird, in a bill filed against the widow, heirs, and administrator of the estate of Zebulon Baird, alleged that during the life of the latter, judgment was obtained against him upon a debt of his sole contracting. That he obtained complainant to become his surety in order to stay execution, in consequence whereof the execution that finally issued on the judgment issued as well against plaintiff as against him. That at the sale under the execution, real estate, which was held by complainant and Zebulon, as tenants in common, was sold, and was bid in by one Z. Candler. That Z. Candler, who had acted throughout as agent of Zebulon, immediately after the sale conveyed the property to the latter. That Zebulon, up to the time of his death, refused to reconvey to plaintiff his original interest in the land, alleging as a reason that he, Beden, was largely indebted to him, and that he would reconvey only upon the discharge of this indebtedness. Complainant denied that any such indebtedness existed, but averred to the contrary, that Zebulon had appropriated to his own use the entire proceeds of the sale of some cattle, in which he was a partner with complainant, and also the proceeds of the sale of certain real estate, in which he was jointly interested with complainant, whereby he became largely indebted to plaintiff. The bill prayed an accounting of the moneys received by Zebulon, as aforesaid; also that the conveyances under which the latter's heirs held the real estate sold at the execution sale be canceled, or that the heirs be decreed to reconvey and for general relief. It appeared from the pleadings and the case proved, that during the latter part of the preceding century, Andrew, Zebulon, and Beden Baird were in copartnership. From this copartnership, in 1799, Andrew Baird retired, leaving the

firm in debt to him. Various payments were made on this indebtedness from the partnership funds, until it was reduced to four hundred dollars. In 1801 or 1802 the firm, consisting of Zebulon and Beden Baird, ceased doing business, but while yet in existence the firm purchased lands, of which the tracts in controversy were part. After the firm ceased doing business, Zebulon Baird gave to Andrew Baird his bond for the four hundred dollars yet due him. Beden refused to join in the bond, alleging that Zebulon had in his hands sufficient partnership assets to discharge the debt. In 1815 this bond was sued upon and judgment obtained. In order to stay execution Beden and another person became Zebulon's sureties. In consequence, execution issued against the three, and the tracts in controversy were sold under it, and were bid in by Z. Candler, Zebulon's agent, who after the sale conveyed to the latter. In 1817 Zebulon went into possession of the tracts by means of tenants, and ever after, to the time of the filing of this bill, which was in 1827, he or his successors in interest remained in sole possession, the only attempted intrusion on their rights being in 1826, when plaintiff cut timber on the land, for which he was sued in trespass. There was no evidence to show whether or not Zebulon at the time that he gave his bond to Andrew had in his hands any of the partnership funds. If the accounts left by Zebulon were accepted as correct, they would show a large balance due him by the firm, and also a balance due him by Beden on his individual account. Defendants, amongst other defenses, relied upon the exclusive adverse possession of themselves and their ancestors for more than seven years. The bill was dismissed as to the administrator, as being barred by the statute of limitations. The judge below assumed the position with respect to the other defendants, that one tenant in common can not purchase the share of his co-tenant at execution sale. From this he deduced that the land purchased by Zebulon could only stand in his hands and in those of his successors as security for the one half of the debt to Andrew Baird, on account of which it was sold. The judge further considered that there had been no ouster of complainant from the tracts in controversy. He therefore ordered an accounting of the rents and profits, and that a partition be had of the lands, so that complainant might hold one half in severalty. Defendants appealed.

Burton and Devereux, for the plaintiff.

Badger, contra.

RUFFIN, C. J. (after stating the case). The pleadings do not appear to be so framed as to raise the questions which were considered in the court below to be involved, and on which his honor declared his opinion. Yet as this court does not concur in the principles declared in the decree, and especially in their application to this case, it would be improper to dispose of the cause without some notice of them.

The case is treated in the decree as a partition cause merely, by one tenant in common against another; in which the defendant set up a whole seisin: 1. By virtue of a conveyance of the title of the plaintiff by a sheriff's sale and deed; and, 2. By virtue of a continued adverse possession of more than seven years, under the color of a conveyance from Candler to their ancestor. The answer admits that Candler purchased at the sheriff's sale, as the agent of Zebulon Baird, who was then co-tenant with the plaintiff, and took the conveyance as his trustee. His honor was of opinion, that one tenant in common could not purchase the share of his co-tenant at execution sale under any circumstances; and therefore, that this purchase in the name of the trustee was a nullity, and did not extinguish the tenancy in common at law, and certainly not in equity. It followed from that position, that partition ought to be decreed, as if no such sale and conveyance had been made. We do not concur in those premises nor in the conclusion. The court is not aware of any decision that a tenant in common can not, nor of any reason why he may not, purchase the interest of his fellow. Their estates are legal and several, the only union between them being that of possession. They do not hold in trust for each other. The rule is only, that the possession of one *eo nomine* is the possession of the other, and that such a possession will therefore never bar his companion.

But the relation between them is not such as to forbid one from purchasing from the other, upon the principle on which a court of equity regards with jealousy the dealings between persons who stand toward each other in a fiduciary capacity. These estates are so completely severed, that, at common law, that of the one could not be passed to the other by release, but required a feoffment and livery of seisin. Why, then, should not one purchase the several estate of the other upon execution? There is nothing in the policy of the law against it. There might be a disadvantage to the debtor by judgment, if the law excluded his companion from bidding, as he would probably give more than any other person. There may, indeed, be dealings between

the parties themselves, upon which an accountability had arisen—as upon the receipt of too much of the profits by one, or outlays in common improvements, or the like, which would render it wrong, as an undue advantage in one, to bring the share of the other to sale; upon which the court might hold the sheriff's deed to be only a security for the true balance that might be found upon a general account. But there is no principle of law which is violated by such a purchase; nor any principle of equity, either, in the case declared, and upon the evidence, properly declared, in the decree; that is to say, that the defendant's ancestor had no funds of the plaintiff in his hands, applicable to the debt, of which the plaintiff owed one half; and that the purchase was made with the party's own money. If a third person have a judgment and execution against one of two tenants in common, his interest may unquestionably be sold; and the sale is valid against him, both in law and equity. His share is the subject of execution. And we can not imagine a reason, why his companion may not fairly, in such a case, be a bidder. So, if one tenant in common have a judgment against another, he may sell the share of the debtor. If he may not, while others may, it will amount to the loss of his debt; for the judgment of the companion is not a specific incumbrance, or an equitable lien, which would follow the land in the hands of a purchaser under another execution, as a claim for outlays in improvements might.

This case is somewhat different from either of those supposed, inasmuch as the execution was against both the tenants in common for a joint debt. But we can not conceive that it calls for a different principle. Although the debt was joint, so that each was bound for the whole, yet as between the parties, half the debt was the separate debt of each, regarding them merely as tenants in common. Suppose a judgment against heirs for the debt of the ancestor, can it be argued, that one heir, in order to save his own estate, is bound to pay the whole debt, and then wait to sue his co-heir for contribution, and to have partition also made before he could have satisfaction? We think he could pay his own proportion of the debt; and then that the proportion of the other heir might be raised by the sale of his share *eo nomine*; at which the heir who had paid his part might be a bidder. If so, his purchase of the whole undivided land must also be good; for, in effect, it is the same as paying his part of the debt first, and then buying his companion's share for his default. It is a very common case, that

one brother buys at sheriff's sale the undivided estate of another brother in descended lands, either for the debt of the ancestor, or that of the brother himself, contracted after the father's death; and we believe the legality of such a purchase has never been questioned. It is a legal, several interest, and as such, subject to execution; and the policy of the law is to invite bidders, and exclude none but those whose duty it is, in a legal sense, to make the thing exposed to sale bring the best price. They are excluded, because the interest of a purchaser is to get the thing at the least price; and is therefore directly opposed to this duty. But it is not the duty of one heir, or of one tenant in common, as such, to pay the debts of another heir or tenant in common; nor to aid in the sale of his estate, by getting the best price for it; nor to refrain from buying it, to his own disadvantage—more than it is the duty of any other person, wholly unconnected with them: *Saunders v. Gatlin*, 1 Dev. & B. Eq. 86. For the only connection consists in the possession; and the estates are entirely disjoined. The court therefore does not accede to the proposition laid down, as a general one; and is of opinion, that one tenant in common may, fairly, buy his companion's share at execution sale.

The particular case now before us is precisely parallel to that of the two heirs. Supposing the transaction a fair one, then, the sale and conveyance were effectual to pass the plaintiff's title. No unfairness is imputed to it in the decree; and we find no evidence of it in the pleadings or depositions. The debt was originally equally due from both the parties, legally and equitably. The brother now deceased gave a security for it, which, from its form, bound him only; but if he had paid it, the plaintiff would have been his debtor for one half. Indeed, the debt of the plaintiff was not merged in the other's bond; but being joint and several, the original creditor might still have sued him alone for the whole debt at law. When he made himself legally liable for the judgment, he did nothing more than he ought to have done, equitably; and might, by another mode, have been forced to do in a court of law. Then the evidence is clear that he refused to pay any part of the debt, upon the false allegation that the debt was owing wholly by Zebulon Baird; and he even repeats that in his bill as the main, and, as we think, sole ingredient of his claim to relief; and, indeed, it is one which could not have been resisted, if it had been in fact true. Why was it said to be the debt of Zebulon alone? We find no reason given for it in the bill, except that Zebulon was indebted

to Andrew Baird, and gave him his bond. The case is then stated as the ordinary transaction between single persons who are debtor and creditor to each other. With that representation of it, the bill adds that the plaintiff became the surety of that debtor; and alleges that he "became liable only as surety." But upon the answers and depositions, it is found that the plaintiff's allegation out of doors was altogether different; and that, admitting the debt to have been originally contracted by him and his brother as partners, he contended that the brother ought to pay it, because he had partnership effects sufficient. In that sense only, according to the proofs, did the plaintiff denominate the debt as Zebulon's alone. But in that point the plaintiff has not offered any proof tending to sustain his position. Indeed, upon these pleadings, as will be mentioned more particularly hereafter, he could offer no such proof. Everything that appears on that point, however, indicates that the truth of the case is on the other side. If, then, the plaintiff in reality owed this debt jointly with his brother, and positively refused to pay any part of it, the creditor might have sold the plaintiff's share of the land, if his co-defendant had paid his proportion of the debt; or the sheriff might justly, at the request of Zebulon, have raised the plaintiff's part of the debt out of his estate; and in either case, upon the principles we have mentioned, Zebulon Baird might have purchased. Such was virtually this transaction. Consequently, the tenancy in common was extinguished, as the plaintiff's estate passed by the sale and sheriff's deed.

Such being the effect of the sale, it becomes unnecessary to consider the character of the subsequent possession. The court, however, does not entertain the opinion that an actual ouster, or disseisin in fact, is necessary to be shown, in order to make the possession of one tenant in common adverse to another. It is true that possession, merely, or the silent sole perception of the profits, will not constitute adverse possession. But even that, continued without claim for a long time, will raise every presumption necessary for its sanction: *Thomas v. Garvan*, 4 Dev. 223 [25 Am. Dec. 708]. And we think that where one who has in fact but an undivided share, is exclusively in possession, under conveyances for the whole, and notoriously claiming the whole in severalty, the possession can no longer be regarded as the common possession, but must be deemed adverse: *Burton v. Murphey*, N. C. T. R. 259; *Clapp v. Brougham*,¹ 9 Cow. 530. More especially must this be true, if the possession should be

1. *Clapp v. Bromagham*,

taken under color of a conveyance for the share of one of the co-tenants, as such, though the conveyance might turn out to be ineffectual. Here the entry in 1817, by Zebulon, was under the deed for the land sold as his own, and as the plaintiff's. That possession could not be the common possession; for he claimed the plaintiff's share against him, and sold parts as sole owner; consequently, the possession must be adverse. If the sale were irregular, or the execution defective, yet the deed was a good color of title; under which the possession for seven years ripened into an indefeasible title by the destruction of the plaintiff's right of entry.

In truth, however, these parties were not mere tenants in common. The answers state, and the evidence proves, that they were general mercantile partners, and that these lands were part of the partnership effects. Tate, the principal witness of the plaintiff, says, that both the parties so informed him repeatedly. They were, therefore, joint tenants, as copartners. That fact thus put in issue by the answers and replication, ought to have been declared in the decree. If it had been declared, it must have put an end to the supposed tenancy in common, and the right supposed to be asserted, to partition of these particular lands, as being held in common, or in joint tenancy simply. There can be no division of partnership property until all the accounts of the partnership have been taken and the clear interest of each partner ascertained. Partners do not necessarily hold equally. They hold according to the sums they are respectively entitled to receive from the common stock. The usual decree is to sell everything and turn all into money for a division. But if the partners are made equal out of other effects, and then lands remain, they may, no doubt, be specifically divided. That, however, can not be known, until the partnership accounts have been settled between the parties, or taken under the order of the court. The bill in this case does not allege a settlement; nor as much as allude to the partnership itself, but seems purposely to evade it. The accounts of the partnership, therefore, could not be taken under it. If they were taken, and Zebulon found to be a creditor of the firm, as alleged by him, the lands would undoubtedly be liable for the general balance due to him, and not merely for half the sum advanced by him on the sheriff's sale. Consequently it was indispensable to take the accounts, to do justice between the parties. As that could not be done upon these pleadings, it was a complete answer to the bill, when it appeared that the

land in question and the debt for the cattle were items merely, in the assets of the mercantile concern. A partner can not demand an account in respect of particular items, and a division of particular parts of the property: but the account must necessarily embrace everything, for the reasons just mentioned.

It may be said that after such a length of time, a bill for an account of the partnership would be barred, and a settlement or satisfaction presumed; and, therefore, that these lands may be taken as a clear surplus remaining and divisible equally between the parties, as joint tenants simply. That may be admitted; for we think it correct, provided it appear that the partners were equally interested; and provided further, that the lands continued to be treated by the parties as joint property, in which each was equally concerned. But that is not our case. The ancestor of the defendants and the plaintiff, each denied an equal interest in the other. The plaintiff alleged that his brother had other funds of the firm in his hands, which rendered him a debtor to the plaintiff; while Zebulon insisted that both the firm and the plaintiff were indebted to him, and for each balance looked to these lands as a security. It may be true, that Zebulon could not enforce his claim by a bill for an account at so late a day as 1827, when this bill was filed. But if the plaintiff would lie by until his copartner could not have the accounts between them taken, by reason of the staleress of the demand, surely it must for the same reason, be too late for the plaintiff to claim a division of the specific lands, in character of joint tenant simply, and without taking the accounts, and avoid these conveyances by which, while they stand, the joint tenancy is extinguished, and the land become vested in severalty in the other party. From the time the parties ceased to treat this land as common property, it could no longer be looked on in a court as mere real estate belonging to them equally, for the purpose of partition, in the light now spoken of. It may be, indeed, that the plaintiff, after such unreasonable laches, and upon a suit brought after the death of his partner, who alone could adjust the accounts with an accuracy at all satisfactory, ought not to have a decree upon any other principle than allowing the accounts as stated and left by his deceased partner. But whether that be so or not, the delay will not in the case which has happened, exempt him from the necessity of the account and authorize partition without taking it. For this land was not regarded by either party as common property; but it was claimed, possessed, and disposed of as the

sole property of one of them, for such a length of time, and under such circumstances, as in a case of tenancy in common would be evidence of an ouster, and make a title under the statute of limitations; and perhaps also, for like reasons, would terminate the trust between the parties as partners; and in this court, in analogy to the rule at law, put the statute of limitations in motion on behalf of the possessor. At all events the plaintiff can not rely on his own laches to excuse him from the account of the partnership, and authorize him to call for a division of these estates as remaining specifically of the assets of the partnership.

But in reality the pleadings present neither of the questions that have been discussed; and no relief can be granted but upon the facts alleged in the bill, and such as is consistent with those allegations, and the prayer founded on them. This bill is as meager in its allegations as can well be imagined, and as limited in the prayer as possible. It sets forth no general partnership, and of course asks for no account of it. "The partnership moneys" mentioned in it are necessarily confined to the sums of five hundred and fifty-one dollars, and one thousand four hundred and seventy dollars, previously spoken of, as the prices of a lot of cattle sold by the two, and of parts of the land jointly owned, which were sold by Zebulon. Those transactions are set forth as merely isolated transactions of limited joint dealings, and in no way connected with a general partnership. The draftsman of the bill did not mean that his client should submit to a general account in order to get a moiety of the lands; but the intention was to get it without the account. The partnership was therefore purposely kept out of sight. Upon those transactions, as stated, the plaintiff had no claim upon the heirs of Zebulon, but only against the personal estate into which the money had gone; and from the payment of it, as money had and received, the administrator was properly held to be protected by the statute of limitations. It is not seen why that matter was put into the bill, which was to pray the relief sought in respect of the land; but as a pretense under which evidence might be given to establish that the debt to Andrew Baird ought to have been paid by Zebulon, although it was originally against both. But it can not have the effect of admitting proof with that view, since the charges of the bill on that point are precise, that the debt was never that of the plaintiff, except as surety only for Zebulon.

Then the case stated with respect to the land is nothing more than that those parties purchased lands jointly, and held them

jointly; and that Zebulon became indebted, and the plaintiff became his surety; and that, upon a joint judgment against them therefor, Zebulon procured the land of the plaintiff to be sold, and indirectly purchased it himself. The bill further alleges, indeed, that Zebulon set up, as a very insufficient pretense for such manifest bad faith and wrong, that the plaintiff was indebted to him, which pretense, the bill states, was altogether unfounded, for, "upon an account of all the partnership moneys received as aforesaid," the balance was the other way. This shows what partnership was in the mind of the pleader; "as aforesaid," referring particularly to the two sums before mentioned as the prices of cattle and land sold. As for the other words in this part of the bill, respecting moneys received "on other accounts, not now known or remembered;" they must be admitted to be too vague for any purpose. The charge respecting those moneys, so far as it is connected with relief in respect of the title of the land, is introduced merely to repel the pretense of Zebulon of the plaintiff's indebtedness to him on other accounts. It is true that, for the reasons before given, neither party has proved, or could prove in this cause, on which side the indebtedness was, since it arose on general partnership dealings which can not here be inquired into. It may be taken, however, either way, and it will not affect the rights of the parties in respect of the land upon the questions made here. For whatever sum the plaintiff might have owed to Zebulon, it would be a plain and gross fraud in the latter to sell, or procure to be sold, the plaintiff's land for a debt of Zebulon, for which the other was bound merely as surety, and to become the purchaser himself. Such a case could not receive the least countenance in a court of justice; but the plaintiff would be entitled to relief against such abuse of his confidence, and of the process of the law, without any regard to the land being before held in severalty by him, or jointly by Zebulon and himself.

The slightest inspection of the bill shows, that such is the gravamen, and solely the gravamen of the plaintiff's case, as stated in it. It is true, there are general words of the sale of the plaintiff's moiety being "unjust, iniquitous, and fraudulent." But epithets of that sort are unmeaning and impertinent in pleading, unless they be used in reference to facts stated, which render, and whereby it may appear, that the act complained of is legally fraudulent. In other words, the facts constituting the fraud must be alleged before proof of them can be received, or the court act on the general allegation.

Here the only facts stated are those mentioned; namely, that the principal debtor contrived to have the land of the surety sold under the execution, and purchased it himself. That turns out to be untrue; for the debt was originally a joint one, and there is nothing appearing, or can appear in this suit, to show that the joint property of the debtors ought not to have been sold to satisfy it; or that the several property of the plaintiff ought not to have paid one half of it. That being established, the plaintiff's case, as made in his bill, was answered, and the bill should have been dismissed. Here may be noticed that part of the decree, which declares that each of the parties had personal property sufficient to satisfy the execution, as was known to the sheriff and Zebulon Baird. That would be material evidence of one species of fraud. But it would be one entirely different from that brought forward by the plaintiff, and is not suggested in the bill. The court could not, therefore, act on it. The fraud here complained of, consists of one man's selling the property of another, for a debt which the former alone owed, and his buying it and holding it from his surety. That the view of the bill here taken is correct, is confirmed by a recurrence to the relief prayed in respect of the land. It is not for a sale as partnership property, nor for a division as of lands held jointly or in common. Partition was not in the contemplation of the writer, for the bill does not even describe or identify the lands. He conceived that the joint estate was extinguished by the sale and deeds; and his object, so far from being a partition, was to restore the original character of the estate, as it was before the sale; and that was his sole object. The prayer is for a discovery of the titles set up by the defendants for the lands which the sheriff had sold, that the court may see whether they correspond with those stated by the bill; and if so, that the defendants may be decreed "to give up the sheriff's and Candler's deeds to be canceled, or may convey to the plaintiff."

Here is not a glance of thought towards a partition. The sole relief sought is, that the deeds may be declared void, as being fraudulent, upon the single ground mentioned in the charging part of the bill; and that thereupon, they may be put out of the plaintiff's way, either by cancellation or a reconveyance; the effect of which would be to let him, unless otherwise barred, get into possession again, or to consider the possession held by the other as a common possession. It seems to the court, therefore, that all that was done in the court below was

out of the case; and that the proper decree in respect of the land would have been, to declare that the debt on which it was sold was not the several debt of Zebulon Baird, but the joint debt of him and the plaintiff; and therefore, that the plaintiff had not proved the fraud alleged by him, and upon which he claimed to have the deeds declared void; and thereupon to have dismissed the bill with costs. The money received for land sold by Zebulon since the purchase at sheriff's sale, stands on the same ground with the land itself; and, therefore the bill ought to be dismissed as to that also. The other moneys, that is to say, those received for land previously sold, and for the cattle, have already been disposed of, upon the ground that they are general partnership assets, or that the administrator was alone liable for them, and is protected by the statute of limitations. As the decree pronounced was not final, and the cause remains in the court of equity, this court can not reverse it, and pronounce such decree here as ought to have been made; but this opinion must be certified to the court of Buncombe, that the former decree may be there reversed, and one entered in conformity to the directions now given. The plaintiff must also pay the costs in this court.

By COURT. Direct accordingly.

Cited to the following points in the cases appended below: Accounts taken between partners must be of the entire partnership transactions, and not of particular items: *Ward v. Turner*, 7 Jones Eq. 76; *Wells v. Mitchell*, 1 Ired. 484; *King v. Galloway*, 5 Jones Eq. 122. Land purchased with partnership funds is held by the partners not as tenants in common, but as joint tenants: *Price v. Hunt*, 11 Ired. 42. Neither partners nor purchasers from them can have partition of lands purchased with partnership funds before the accounts of the partnership have been taken: *Flanner v. Moore*, 2 Jones, 123; *Buchan v. Sumner*, 2 Barb. Ch. 204. In equity, land purchased with partnership funds is devoted to partnership purposes, and a trust is created in it for the security of partnership debts, which will affect vendees of the property, if at the time of their purchase they knew of its being partnership property: *Ross v. Henderson*, 77 N. C. 170. A tenant in common may purchase his co-tenant's estate at its sale under a power given by that co-tenant in a deed of trust executed by him to secure payments of certain sums of money: *Burr v. Mueller*, 65 Ill. 262. Surviving partner is liable to account to the representatives of the deceased partner: *Houston v. Stanton*, 11 Ala. 421.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WILLIS W. HILL.

[2 DEVEREUX AND BATTLE LAW, 281.]

MONEY BORROWED BY A PARTNER UPON HIS INDIVIDUAL CREDIT, and for which he gives his separate bond, is not chargeable to the partnership, though it comes to its use.

DECLARATIONS OF A PARTNER AFTER DISSOLUTION can not charge the partnership with a debt; though if the existence of the debt and the original liability be proved otherwise, such declarations would be sufficient to remove the bar of the statute of limitations.

ASSUMPSIT. In October, 1833, a partnership existing between defendant and W. E. Hobson was dissolved. Shortly thereafter Hobson borrowed from plaintiffs a sum of money, for which he gave the following acknowledgment:

“Received of Henry Willis & Co. four hundred dollars to purchase negroes, or return in a few days.

“Wm. E. Hobson. [L. s.]”

To connect the partnership with the instrument, declarations of Hobson, that the money was advanced to him on behalf of the partnership, and that it came to the use of the defendant, were offered. Under the charge of his honor, the jury found for plaintiffs. Defendant appealed.

J. T. Morehead, for the defendant.

W. A. Graham, contra.

RUFFIN, C. J. Although the use by a firm of money, borrowed by one of the partners, may be evidence that it was borrowed for the partnership, and upon its credit, yet it may be doubted whether such an inference is admissible, when the

borrowing partner gives his own separate security and obligation for the amount. It is distinguishable from the case of *Horton v. Child*, 4 Dev. 460, because there a joint debt, both in law and in fact, was constituted by the sale of the goods to the partnership, and the obligation thereon of the one partner, was not merged in the bond subsequently given by the other. But in this case, the question is, whether there ever was a joint debt; that is to say, whether the contract was made with the firm, or made with Hobson individually. The money was advanced to Hobson, and his separate note taken for it; and it does not appear, that at the time any reference was made to the partnership, either as the beneficial borrower, or as being liable for the repayment. The express contract at the time of the loan with the borrowing partner, it should seem, ought to prevent the lender from afterwards making himself the creditor of the firm. That seems to be a fair inference from the form of the security: *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7. But if that may be explained by evidence, that the loan was on the credit and for the business of the partnership, notwithstanding appearances to the contrary; yet we deemed it certain, that his honor erred in stating to the jury in the alternative, that the defendant was liable if the money was advanced on the credit of the firm, "or was applied to the benefit of it." The last part of the alternative can only be understood to mean, that the firm was the debtor, simply because the money was used by Hobson on the joint business, although he had not only given his separate bond for it, but had actually borrowed it on his individual credit. The proposition is too unjust to be deemed reasonable or legal. One partner frequently borrows the very capital stock which he puts in, and on which his share of the profits is to grow; and yet this would make his copartners liable to the lender. When a partnership gets merchandise, which was bought by one of the members, there is a clear ground for saying that the purchase was made by the firm. But Lord Eldon observes, it is not enough to prove that money, borrowed by an individual partner, goes into the partnership estate, to make the partners liable. He may have borrowed it and paid it in fulfillment of the articles; or to replace sums improperly abstracted by him; or to reduce his account; or for many other purposes. In *Bevan v. Lewis*, 1 Sim. 376, it was held, that if a partner borrow money on his own security only, it does not become a partnership debt, although applied to partnership purposes, and with the knowledge of the other partner. The

borrowing partner is the creditor of the firm, and not the original lender. The same point is decided in *Jaques v. Marquand*, 6 Cow. 497. Admitting, therefore, the declarations of Hobson to be admissible evidence and true, they did not establish a case for the plaintiff. They do not contradict the inference from the security given by him, that the money was taken up on his own credit exclusively, but rather confirm it. He says only, that he laid out the money in slaves, which the defendant received and sold; but does not say that the money was lent or borrowed for the firm or in its name.

But if those declarations had purported distinctly to affirm those facts, the court is of opinion that they would not have been competent, and ought not to have been received for that purpose. They are not the declarations of a partner in the course of transacting partnership business, but were made long after the notorious dissolution of the partnership, and after this suit had been pending three years, and pretty obviously to be used as evidence upon the trial. They were received probably upon the authority of the case of *Wood v. Braddick*, 1 Taunt. 104. But we think the present is out of the reasoning in that case. A different principle, indeed, has prevailed in many of the courts of this country, which is, that after a dissolution, the acknowledgment of one partner of an account, or of a fact, can not bind the other, except to repel the statute of limitations: *Hackley v. Patrick*, 3 Johns. 536; *Walden v. Sherburne*, 15 Id. 424; *Baker v. Stackpoole*, 9 Cow. 420 [18 Am. Dec. 508]; *Shelton v. Cocke*, 3 Mumf. 191. And in *Bell v. Morrison*, 1 Pet. 351, the supreme court of the United States went so far as to lay it down that such an acknowledgment did not take a case out of the statute of limitations. With us it is decided otherwise in *McIntyre v. Oliver*, 2 Hawks, 209 [11 Am. Dec. 760], and we can not therefore adopt that proposition of *Bell v. Morrison*. Nor are we under a necessity in this case of expressing a concurrence in the other cases cited; for this is not an acknowledgment of the amount merely of a partnership debt, of which the existence is proved by other evidence; but in the absence of all other evidence of a dealing by the plaintiff with the partnership or with Hobson as one of the partners, it is an attempt to create a joint liability by the admission singly of one of the partners after a dissolution. It stands here much upon the same ground with an attempt to prove the partnership by such an admission. It is precisely the same case as if the present suit had been against both Hill and Hobson, and the latter had suffered judgment by

default or by *nil dicit*; which surely would not overrule the plea of the general issue by the other defendant.

In *Wood v. Braddick*, the consignment was made in 1796, the dissolution took place in 1802 as of 1800, and Cox's letter, stating the balance was written in 1804. It was therefore clear that *prima facie* the partnership, and not Cox, was originally liable; and the questions were, whether the letter of 1804 was evidence to repel the statute, and also of the balance. It was held that it was, on the principle that "the dissolution is only with regard to things future, not to those past; for with regard to the latter, the partnership continues and always must continue." But the question is, what things past are meant? Certainly only those which concern the partnership. To make the admission of one partner after the dissolution affect the other, it must be shown, otherwise than by that admission, that the subject to which the admission relates did concern the joint dealing. If it were not so, it would be in the power of one person, not upon oath, to charge another with any sums, at any time, simply because they had once been partners, by admitting that, while partners, they contracted a joint debt. Such a rule is too dangerous to be tried. But the case does not stop there. This is not only an attempt to charge one man upon the admission of another, but to charge him for a debt, with which the other is apparently exclusively chargeable upon his own separate bond, and will so remain exclusively chargeable, unless by his admission he can throw a part of it on the defendant. There could not be a stronger case for rejecting the declarations; upon the ground of the suspicions thrown upon them by the relation of the parties, and the interest of the person making them, as well as that they are mere declarations, not on oath. There is *prima facie* evidence that Hobson alone contracted the debt; and conclusive evidence that he gave as the security his own separate bond; so that apparently at least he alone is liable. The only evidence on which the defendant is to be made liable to the plaintiff, and for contribution to Hobson, consists of the declarations of Hobson himself, made long afterwards, that the debt was originally contracted on the joint credit of himself and the defendant. They can not be satisfactory to the mind, of the truth of the matter declared, but may mislead a jury; and therefore ought not to have been received.

In the opinion of the court, the judgment of the superior court is erroneous and must be reversed; and a *venire de novo* awarded.

By Court. Judgment reversed.

Cited to the effect that where an individual partner is upon the face of a transaction liable personally for a debt, his declarations are not admissible evidence to charge the partnership with it: *Lazarus v. Long*, 3 Ired. 41; *Street v. Meadows*, 11 Id. 132. That the admission of a partner after the dissolution of partnership may remove the bar of the statute of limitations, as well against the other partners as against himself: *Walton v. Robinson*, 5 Id. 343.

ADMISSIONS OF A PARTNER AFTER DISSOLUTION are admissible to take a case out of the statute of limitations, the existence of the debt having been first proved: *Greenleaf v. Quincy*, 28 Am. Dec. 145 and note, where the previous decisions on the subject in this series are collected. Admission of indebtedness by a partner after dissolution is not of itself sufficient to bind the other partners: *Chardon v. Oliphant*, 6 Id. 572 and note 574.

STATE v. PENDERGRASS.

[2 DEVEREUX & BATTLE LAW, 365.]

SCHOOLMASTER'S AUTHORITY EXTENDS TO THE INFLICTION of corporal punishment upon his pupils, subject to the qualification that he may not inflict punishment of a nature to produce lasting injury to body or health.

SCHOOLMASTER ACTS JUDICIALLY in determining the necessity of punishment, and the extent to which it should be administered, and will be liable only when he punishes under pretext of authority, to gratify malicious feelings.

INDICTMENT for assault and battery. The offense consisted in a whipping with a switch, inflicted by defendant, a schoolmistress, upon one of her younger pupils. The switching left marks upon the body of the child, upon which were also found marks apparently made by some blunter instrument than a switch. All of these marks, however, disappeared in a few days. The nature of the charge to the jury appears from the opinion. Verdict was against defendant, who thereupon appealed.

The Attorney-general, for the state.

GASTON, J. It is not easy to state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty can not be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him

to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.

The law has not undertaken to prescribe stated punishments for particular offenses, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher. The line which separates moderate correction from immoderate punishment, can only be ascertained by reference to general principles. The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs, or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, can not be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare. We hold, therefore, that it may be laid down as a general rule, that teachers exceed the limits of their authority when they cause lasting mischief; but act within the limits of it, when they inflict temporary pain.

When the correction administered, is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely, we think, on the *qui animo* with which it was administered. Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and like all others intrusted with a discretion, he can not be made penally responsible for error of judgment, but only for wickedness of purpose. The best and the wisest of mortals are weak and erring creatures, and in the exercise of functions in which their judgment is to be the guide, can not be rightfully required to engage for more than honesty of purpose, and diligence of exertion. His judgment must be presumed correct, because he is the judge, and also because of the difficulty of proving the offense, or accumulation of offenses, that called for correction; of showing the peculiar temperament, disposition, and habits, of the individual

corrected; and of exhibiting the various milder means, that may have been ineffectually used, before correction was resorted to.

But the master may be punishable when he does not transcend the powers granted, if he grossly abuse them. If he use his authority as a cover for malice, and under pretense of administering correction, gratify his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice, as an individual not invested with judicial power.

We believe that these are the rules applicable to the decision of the case before us. If they be, there was error in the instruction given to the jury, that if the child was whipped by the defendant so as to occasion the marks described by the prosecutor, the defendant had exceeded her authority, and was guilty as charged. The marks were all temporary, and in a short time all disappeared. No permanent injury was done to the child. The only appearances that could warrant the belief or suspicion that the correction threatened permanent injury, were the bruises on the neck and the arms; and these, to say the least, were too equivocal to justify the court in assuming that they did threaten such mischief. We think that the instruction on this point should have been, that unless the jury could clearly infer from the evidence, that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child, it did not exceed the limits of the power which had been granted to the defendant. We think also, that the jury should have been further instructed, that however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant; unless the facts testified induced a conviction in their minds, that the defendant did not act honestly in the performance of duty, according to her sense of right, but under the pretext of duty, was gratifying malice.

We think that rules less liberal towards teachers, can not be laid down without breaking in upon the authority necessary for preserving discipline, and commanding respect; and that although these rules leave it in their power to commit acts of indiscreet severity, with legal impunity, these indiscretions will probably find their check and correction, in parental affection, and in public opinion; and if they should not, that they must be tolerated as a part of those imperfections and inconveniences, which no human laws can wholly remove or redress.

By COURT. Judgment reversed.

The principal case has been cited with approval in *State v. Stalcup*, 2 Ired. 50; *State v. Black*, Winst. 266; *State v. Rhodes*, Phil. 453; *State v. Alford*, 68 N. O. 322.

THE POWER OF THE SCHOOLMASTER TO PUNISH corporally a refractory pupil is universally conceded as being necessary to him, in his enforcement of the discipline indispensable to a fruitful pursuit of his avocation. The only conflict arises upon the question as to the rule which shall measure the right. Two views are open, either of which enjoys judicial support. The one considers the teacher *in loco parentis* and as exercising judicial functions whenever called upon to determine the gravity of an offense and the character of the punishment that it merits. The qualifications to his power being that no punishment must be inflicted that is of a nature to cause lasting injury to body or health, and that punishment must not be inflicted from malicious motives. This view is supported by the principal case: *Commonwealth v. Seel*, 5 Pa. L. J. 78; *State v. Burton*, 45 Wis. 150, and is adopted by Mr. Reeves: *Reeves on Domestic Relations*, 288.

The other view requires that in inflicting corporal punishment a teacher should exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment, by a consideration of the nature of the offense, the age, size, etc., of the offender: *Commonwealth v. Randall*, 4 Gray, 36; *Lander v. Seaver*, 32 Vt. 114; *Anderson v. State*, 3 Head, 455; *Cooper v. McJunkin*, 4 Ind. 90. Both of these views establish the same uttermost limit of punishment, that a teacher may not overstep. They differ in this, that while the first view allows the limit to be reached whenever the teacher, acting without malice, thinks it necessary, the other requires different degrees of punishment to be graduated to different offenses. In the one case, to find a teacher guilty of an assault, it is sufficient for the jury to become satisfied that he acted without the exercise of reasonable judgment and discretion; in the other, they must find that he acted maliciously. This latter view appears the more correct. The qualification that the schoolmaster shall not act from malice will protect his pupils from outbursts of brutality, whilst upon the other hand he is protected from liability for mere errors of judgment.

It must be said, however, of the courts requiring the teacher to exercise reasonable judgment, that they impose in his favor the safeguards, that the prosecution must show affirmatively that the punishment was disproportionate to the offense, for if the punishment alone appear from the evidence, it will be presumed to have been justifiable: *Anderson v. State*, 3 Head, 455; *Lander v. Seaver*, 32 Vt. 114. This power is given to enable the enforcement of discipline; it will therefore extend over pupils, who have attained the age of majority: *State v. Mizner*, 45 Iowa, 248. *Morrow v. Wood*, 35 Wis. 59, presented the case of a conflict of the authority of parent and teacher. There a father directed his child to pursue only certain studies selected by him from those required or permitted by law to be taught at the school, and also forbade the child to pursue a certain other study. This was known to the teacher, and it was thereupon held that the latter was not authorized to inflict punishment for the purpose of compelling the child to pursue the study forbidden by the father.

DAVENPORT v. SLEIGHT.

[2 DEVEREUX & BATTLE LAW, 381.]

BOND EXECUTED WITH BLANK FOR INSERTION OF ITS AMOUNT is not a deed, nor can it be made such by the filling of the blank, by an agent authorized by parol.

DEBT on bond. The case appears from the opinion.

Haughton and Devereux, for the plaintiff.

RUFFIN, C. J. The instrument sued on is not, in the opinion of the court, the bond of the defendant. When put into the hands of Frasier, it was not a deed, because it was imperfect and did not purport to oblige the payment of any sum of money. The parol authority to Frasier to fill up the blank with the sum that might be agreed upon as the price of the vessel, we think, is not a valid authority to deliver the paper, thus completed, as the deed of the defendant. Being executed in his absence it does not bind the defendant. The case of *McKee v. Hicks*, 2 Dev. 379, is directly in point. It is authoritative as a decision of this court; and it must be admitted that the point was before, at the least, not clear on the side of the plaintiff. But upon reconsideration, we agree to the doctrine of that case as that of the common law. The ancient rule is certain, that authority to make a deed can not be verbally conferred, but must be created by an instrument of equal dignity. It is owned, that there are modern cases, in which it seems to have been relaxed with respect to bonds. This began with the case of *Texira v. Evans*, cited in 1 Anst. 229, note, on which all the subsequent cases profess to be founded. The court is not satisfied with the reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences. Because bonds are in frequent use as mercantile instruments and are negotiable, it seems to have been thought that they may be safely treated as if altogether of that character. If they can be filled up upon a verbal authority, the step is, indeed, a short one to allow the holder to do so; and a bond may be made by signing and sealing a blank piece of paper, as a promissory note may be by signing it. We think the difference is in the solemnity of the instruments. The danger of abolishing that distinction consists in the necessity that would then arise, of applying the rule as modified, to conveyances and deeds of every description, as well as to this particular kind, namely, bonds.

No person will argue in favor of a deed of conveyance, in which the name of the bargainee, for instance, or the description of the land was inserted after execution by the vendor and in his absence, although done without corruption, and by some person whom he requested to do it. It would subvert the whole policy of the law, which forbids titles from passing by parol, and requires the more permanent evidence of writing and sealing. A bond is to be regarded as precisely on the same footing with any other deed. To make a bond out and out in the name of another, certainly requires a letter of attorney by deed. A verbal authority to seal a bond is not sufficient. To make the instrument a different one in form and in substance from what it was when the supposed obligor parted from it—to make it a sensible, and upon its face, an operative obligation to pay a certain sum out of a writing, which was altogether insensible, and did not bind the obligor to pay any sum—is essentially to make the bond. In none of the cases is it suggested that such acts can be done by a stranger. But it is said, the party ought to be bound, because the words were inserted by his agent. That is assuming the position in dispute. There might be an agency to receive the money or make the purchase, which would in law be sufficient, when there was not an agency to bind the principal by this form of security. The very question is, whether the person, who wrote out the bond and delivered it, was in fact and in law, the agent for that purpose. To determine it, we are obliged to recur to the rule of law, which defines what may create an authority to make a deed, and by what evidence that authority may be established. If it can not legally exist without a deed, then he who had only a verbal authority, was not in law an agent for this purpose, though he might have been for others.

We think likewise that the defendant has not made it his bond by any subsequent act. If a deed be perfect in its frame, there is no doubt the execution of it by one party is good, and the instrument will not be invalidated by the execution of another party to it, in the absence of the former. But where it is incomplete when executed, it is well settled that the insertion of the matter, which is necessary to perfect it, avoids it as a deed, as first executed and by force of that delivery, unless after the alteration there be a redelivery, or that which is tantamount to it. The case cited for the plaintiff, *Hudson v. Revell*,¹ 5 Bing. 368, admits this; and determines only that filling

1. *Hudson v. Revell*.

up a blank in the presence of the party and by his assent, is in law a redelivery, contrary to the passage in Buller's *Nisi Prius*, 267. We see no objection to that position. But it has no application to the case at bar. Here, the defendant never saw the bond after it first came to the plaintiff's hands. Nothing that he could say in the absence of it, could amount to the adoption of it as his deed—the essential requisite of delivery by himself or by his attorney duly authorized, in its altered state, being wanting. But what the defendant did say, is certainly quite insufficient. It is simply an acknowledgment, that by parol he appointed Frasier his agent, first to buy the vessel, and secondly, to fill up the bond. The acknowledgment of those facts, establishes no more than the proof of them by witnesses would. They very clearly establish a case in which the plaintiff could recover the price of the vessel on the contract of sale. But they show only an insufficient authority to fill up and deliver the bond; and do not in the least denote an intention of the defendant (if that would do) to be bound by it as his bond; much less amount to a delivery of it as such. It is not, therefore, the deed of the defendant; and the judgment must be affirmed.

By COURT. Judgment affirmed.

Cited, to the point that the agent who executes a deed must be authorized under seal, and that an agent authorized by parol can not consummate a deed by filling the blanks in it existing at the time of its delivery: *Graham v. Holt*, 3 Ired. 302; *Blacknall v. Parish*, 6 Jones Eq. 71; *Bland v. O'Hagan*, 64 N. C. 472.

DEED EXECUTED IN BLANK: *Duncan v. Hodges*, 17 Am. Dec. 734; *Stahl v. Berger*, 13 Id. 666, note 669; *Woodworth v. Bank of America*, 10 Id. 271, note.

GRIFFIS v. SELLARS.

[2 DEVEREUX & BATTLE LAW, 492.]

WANT OF PROBABLE CAUSE must be proved in order to sustain an action for malicious prosecution.

PROBABLE CAUSE EXISTS where the facts and circumstances are such that when communicated to the generality of men of ordinary and impartial minds, they will be sufficient to raise in them a belief or grave suspicion of the guilt of a person.

VERDICT OF CONVICTION FOLLOWED BY JUDGMENT of the trial court is conclusive evidence of the existence of probable cause to warrant the prosecution, though the judgment of conviction is vacated on appeal.

CASE for malicious prosecution. The plaintiff had judgment below. Defendant appealed. The facts of the case appear in the opinion.

Devereux, for the defendant.

W. H. Haywood and W. A. Graham, contra.

BURTON, C. J. The innocence of the plaintiff, and a bad motive in the defendant, though necessary, are not the sole or sufficient grounds of this kind of action. It is the interest of the public that there should be a fair investigation in every case of reasonable suspicion; and therefore the law, upon its policy, denies to one really innocent an action against him who promoted the investigation of a case of proper suspicion. Hence the declaration must allege that the prosecution was preferred without any just and reasonable, or, as it is commonly said, probable cause; and of that there must be proof from the plaintiff.

Waiving the inquiry, whether the question of probable cause be, from its nature, one of law or one of fact, and admitting that there may be cases in which it is a mixed question, and, as partly partaking of both, may be left to the jury under the advice of the court, yet it is perfectly certain, that, as legal inferences, presumptions of the want of probable cause, on the one hand, and of its existence, on the other, are held to be established by the judicial acts in the various stages of the prosecution.

Similar inferences from the proceedings likewise remain to some extent after their determination. It is settled in this state, that a discharge by the examining magistrate imports that the accusation was groundless: *Bostick v. Rutherford*, 4 Hawks, 83. If the magistrate commit, or if the grand jury find a bill, it has never been doubted that, in law, that is evidence of probable cause, and calls for an answer from the plaintiff as to the particular circumstances; which imposes it on the plaintiff to go into the circumstances, in the first instance. It is true, that in these cases the evidence is deemed *prima facie* only; but nevertheless, it is evidence in that degree, as declared by law, and the principle is made a part of the law of evidence. After conviction, however, the evidence rises in degree, and is conclusive. This action will not lie under any circumstances after conviction. Why? Because a competent tribunal has judicially fixed the plaintiff with guilt, and, *a fortiori*, established probable cause for the prosecution.

This proposition is not denied, when the conviction remains in force; but in this case it seems to have been supposed that the judgment of the county court lost its character of conclusive evidence by the appeal and final acquittal in the superior court. Upon authority and reason this court has arrived at a different conclusion.

Upon looking into adjudications, one is found nearly a century old, and not since questioned, which is directly in point. In *Reynolds v. Kennedy*, 1 Wils. 232, the declaration was for a malicious seizure of brandy, and exhibiting an information before the sub-commissioners of excise, by whom they were condemned; but upon an appeal to higher commissioners, the judgment was reversed and the brandy restored. After verdict for the plaintiff, the judgment was arrested in the court of king's bench in Ireland; and upon a writ of error in the king's bench in England, that judgment was affirmed. The chief justice, Lee, in delivering the unanimous opinion of the court, said the judgment of the sub-commissioners justified the proceeding before them, and the plaintiff having laid that in his declaration, shows a foundation for the prosecution before the sub-commissioners; so that the declaration was *felo de se*. As that case was on writ of error, these are the necessary consequences: First, that the inference of probable cause from a conviction by a competent jurisdiction is a legal one, to be made by the court; and, secondly, that it must be made, notwithstanding a subsequent reversal, and also a verdict to the contrary in the action for malicious prosecution. It can not be disproved. The court is not aware that there has been any case on the point in this state. In England, *Reynolds v. Kennedy* has not been questioned, and was relied on as law in *Sutton v. Johnstone*, 1 T. R. 493, and in Massachusetts the law is settled in accordance with it: *Whitney v. Peckham*, 15 Mass. 243. Our attention has been called to the case of *Cotton v. James*, 20 Eng. Com. L. 358,¹ as being in conflict with the others. But it is not so. That is an action for maliciously suing out a commission of bankruptcy, under which the plaintiff was declared a bankrupt, and which was superseded on the application of the defendant. It has no reference to the principle under consideration. The determination of commissioners of bankruptcy is not of the nature of a judgment. They have a mere authority, without judicial jurisdiction, and act *ex parte*; so that their declaration is not even *prima facie* evidence of bankruptcy for the assignees, who must

1. 20 Eng. Com. L. 424; S. C., 1 Barn. & Adol. 128.

show by other evidence an act of bankruptcy to support the commission, and their assignment under it; *Rex v. Inhabitants in Glamorganshire*, 1 L. Raym. 580; *Groenvelt v. Burwell*, Id. 467.

But without the aid of an adjudication, the doctrine carries conviction along with it, especially in reference to a judgment founded on the verdict of a jury. It is to be recollected that the subject of inquiry in such a case is, whether there was probable cause for the prosecution. What is probable cause? It is constituted by such facts and circumstances as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief, or real grave suspicion of the guilt of the person. Now, what more satisfactory criterion can there be, by which to determine what influence those facts and circumstances might or ought to have had on the mind of the prosecutor, than that which it is certainly seen they have had on the minds of twelve upright men, chosen for their indifferency for the parties? We do not desire to be considered as laying it down that a verdict, if set aside by the court in which the trial was had, would establish probable cause. Probably that may stand on different reasons; but if so, we have no concern with it at present. A verdict and judgment of acquittal certainly do not imply a want of probable cause; because such a verdict may be given, notwithstanding strong suspicion, because there is not full proof of guilt. But after a conviction by verdict, followed by sentence, it ceases to be a matter of conjecture, of argument, and of reasoning, whether guilt could rationally be inferred from the facts admitted or proved; for such a state of things can not occur, but after full defense by the accused, with deliberation by the jury, aided by the court, upon all the evidence, as well explanatory as negative, offered by the accused; and, after all that, guilt was in fact inferred by a numerous body of men of competent understanding and integrity, and the court was also satisfied with it. As evidence of probable cause, a conviction by verdict and judgment is as convincing, and therefore ought, in law, to be as high and conclusive, although vacated by appeal, as if it stood unreversed and in full force. It sanctions the prosecution in its origin and progress through that court, and is the highest evidence, namely, a judicial sentence of record, that apparently the accused was guilty. It is true that the law, in its benignity, allows the convict to show, on appeal to another court, that he is really not guilty. But that does not show, nor can it be shown against

the facts of the first verdict and judgment, that there was no just and probable cause of accusation.

The verdict in this case, therefore, ought not, we think, to stand; as it appears affirmatively in the case stated to be against law. It was erroneous, in our opinion, to submit the case to the jury on any circumstances *dehors* the record, without or with an opinion from the court, that those circumstances did or did not constitute probable cause. The plaintiff stated his conviction in the county court in his declaration, or at least, it appeared in the record which he was obliged to read. Then the plaintiff's own pleadings, or evidence, contained proof of probable cause, and was destructive of his case. To use the words of Chief Justice Lee, the plaintiff's case was *felo de se*; and there was nothing to submit to the jury. The judgment must be reversed, and a *venire de novo* ordered.

By COURT. Judgment reversed.

A subsequent case of *Griffis v. Sellars*, in which plaintiff was brother of present plaintiff, came before the court, 4 Dev. & B. 176, upon similar facts, and therein the views taken in the principal case were reiterated.

CONVICTION, AFTERWARDS VACATED ON APPEAL.—The decisions are contradictory as to whether this is or not conclusive evidence of the existence of probable cause: *Frowman v. Smith*, 12 Am. Dec. 267, note.

HASKINS v. YOUNG.

[2 DEVEREUX & BATTLE LAW, 527.]

ALTERATION OF A WARRANT OF ARREST after it has finally left the hands of the magistrate issuing it, by another magistrate, before whom it is returnable, by his addition of the name of a person against whom it shall run, is illegal, and the warrant will not justify the arrest of such person.

WARRANT MUST DESCRIBE WITH CERTAINTY the persons whose arrest it requires, and where the recitals of a warrant state an offense to have been committed by "A. B. and company," and thereupon the warrant commands the arrest of "said company," the description is too uncertain to justify an arrest.

ARREST IS CONSTITUTED where there has been submission to an authority over one's person asserted by virtue of a pretended warrant.

TRESPASS *vi et armis*, for an assault and false imprisonment. Defendant Young had caused a warrant to issue, wherein it was recited that complaint had been made of the beating and wounding of a slave belonging to Young, by John A. Mead and company, wherefore the writ proceeded to command the arrest of "said company." This was the only description in the war-

rant of the persons whose arrest was required. The writ was returned before Mr. Reed, another magistrate than the one who issued it, because the latter, being a relative of Young, felt disqualified to act in the case. Mead was first arrested under this writ. After his arrest, Mr. Reed inquired who were meant by the words "the company" in the writ. Being told whom it meant, he introduced their names after that of Mead, in that part of the writ which recited the beating and wounding of the slave by John A. Mead and company; but he left unchanged the directory part of the writ, which still therefore remained a command to arrest "said company." Plaintiff, one of the persons whose names were thus entered on the writ, was sent for, and came before the magistrate; he was thereupon advised by defendant Boyd, to whom the writ was addressed, that he, Boyd, had a warrant for his arrest, and was asked whether he surrendered; he answered in the affirmative. Plaintiff was then bound over to answer the charge preferred in the warrant. The jury was charged that the alteration of the writ by Mr. Reed was illegal, and no justification for plaintiff's arrest; that if they believed that plaintiff surrendered himself into the custody of Boyd, and was treated by the latter as in custody, then there was an arrest. There was a verdict for plaintiff. Defendants appealed.

GASTON, J. This action of trespass and false imprisonment has grown out of the same transaction which gave rise to the action of John A. Mead against these defendants, in which an opinion has just been pronounced. For the proper understanding of the exceptions taken in this case, it is necessary to state, in addition to the circumstances mentioned in the opinion referred to, that, etc. (Here his honor stated the circumstances of the case, and the charge of the judge thereupon, as mentioned above, and then proceeded as follows.) We hold both parts of the charge to be correct. A warrant for the apprehension of a man's person is an act of no unimportant character; and certainly no alteration can be rightfully made in it after it has finally left the hands of the magistrate who issued it. He decides upon his official responsibility, whether a warrant shall issue, and against whom it shall issue. Altered without his authority, it is no longer his warrant—and if it be not the warrant of the magistrate under whose signature it is sent forth, whose warrant is it? It may be remarked, however, that independently of the ground upon which the judge held the apprehension of the plaintiff illegal, the warrant, supposing it

rightfully altered, was yet open to the same objection which we have held fatal in the other case. In its mandatory part it contained no names of the persons to be arrested, nor in any way described them, but as the "said company." We think, also, for the reasons given in the former case, that the other part of the instruction complained of was correct. Boyd, claiming authority to take the plaintiff under the warrant directed to Boyd, inquired of him whether he submitted to such arrest—received his submission—and detained him in custody under it until he ransomed his person from restraint. The judgment is affirmed.

By COURT. Judgment affirmed.

ARREST, WHAT IS: *Bissell v. Gold*, 19 Am. Dec. 480 and note 485.

C A S E S
IN THE
SUPREME COURT
OF
O H I O.

GLENN v. BANK OF THE UNITED STATES.

[8 OHIO, 72.]

JOINDER BY A MARRIED WOMAN IN THE DEED of her husband's attorney in fact, will bar her of dower, under a statute which prescribes that a right of dower may be barred, either by a joinder of the married woman in her husband's conveyance, or else by her joining in the husband's power of attorney to convey.

BILL, seeking dower out of lands which had been conveyed during the life-time of plaintiff's husband by his attorney in fact, by deed in which plaintiff had joined. The only objection advanced against this deed, was that a joinder with her husband's attorney in fact, could not, under the statute, bar a wife of her right to dower.

V. Worthington, for the plaintiff.

N. Wright, contra.

By Court, **GRIMKE, J.** The question arising in this case is a new one; but as there are no new principles of law, it may not be difficult of solution. At the time the deed was executed, the statute of January, 1818, was in force. That act prescribes two modes by which a married woman might release her right of dower; one by joining in the conveyance made by her husband, the other by joining in a power of attorney to convey. The conveyance to the bank appears to be illegal, because it does not pursue either of these provisions singly; but if it is a combination of both, it will not, on that account, be less firm and obligatory; on the contrary, the statute will be as faithfully complied with, as it would have been in the former case, as every statute at the

same time that it professes to ordain a new rule, contains also a recognition of a great variety of old ones, by the assistance of which we are alone able to understand and interpret it; it becomes necessary to look both in and out of the statute, whenever any controversy arises demanding a construction of it. A conveyance by a man, by attorney, is itself the creature of the common law: it has not its origin in any statutory provision. Thus any one who had power to convey directly by deed, had also power to convey indirectly by attorney. The two modes of conveyance are virtually the same: in both instances, the deed executed is the deed of one and the same person, and the instrumentality of the agent is no further regarded, than as he identifies himself with his principal.

The statute of 1818, not noticing, but necessarily recognizing these principles, has authorized a married woman to unite in a conveyance made by her husband. Mrs. Glenn has actually made herself a party to a deed, which, in no view you can take of it, can be deemed to be the deed of any other person than her husband; and I do not see but what she is completely and fairly estopped from demanding an assignment of dower. The antiquated mode of barring dower is unknown in Ohio. We have adopted a more simple and enlightened form of proceeding, and it is greatly to the credit of English jurisprudence that in its numerous efforts of late years to imitate our laws, it has not forgotten this feature of them; a bill having been introduced into parliament authorizing the American mode of conveyance by husband and wife. If it should be said that there is less solemnity attending it than the ceremony of fine, it may at any rate be asserted that it is better adapted to the advanced condition of women at the present day. Our laws are in reality, to a great extent, a transcript of our manners. If women, as well as men, have been lifted to a higher standard than when fines were invented, it is natural that the law, in every arrangement which it makes for the protection of their interests, should be accommodated to that altered condition; and this affords a very good reason why we should not voluntarily apply any very nice and technical rules in the construction of a statute which is made in furtherance of, rather than in derogation of the rights of married women.

There is no direct authority to be found on either side of the question; but there is a dictum of Parsons, in *Fowler v. Shearer*, 7 Mass. 21, which is entitled to notice. It says the consent of the husband to the conveyance of the interest of the wife in lands,

"must be manifested by his joining in the deed, either in person or by attorney." The case did not demand the determination of this point; however, the dictum of so profound a lawyer, who was not accustomed to hazard any random opinion, is entitled to the greatest attention. It is evident that our law has two ends, apparently diverse and contradictory, in view. One is to protect the wife from the influence and persuasion of the husband; the other, regarding them strictly as but one person, renders it necessary that his consent should be manifested to the conveyance. The first is accomplished by a separate examination of the wife, the other by making him a necessary party to the deed. The mode of conveyance in this instance does not interfere with the first intention, but rather contributes to further it; nor does it interfere with the second, as it is impossible to imagine a more plain and unequivocal declaration of consent on the part of the husband, when the deed executed by him purports to be a conveyance of the entire interest in the land. If I could suppose a case in which a husband might execute a deed of this nature, and yet at the same time, fairly and without any design to commit a fraud, intend not to convey an absolute interest, I might hesitate; but I can not suppose such a case.

I conclude, therefore, that Mrs. Glenn has precluded herself from demanding dower, and that the motion must be granted.

In *Fowler v. Shearer*, 7 Mass. 20, the authority relied upon in the principle case, Chief Justice Parsons, speaking of the modes in which a wife might bar herself of her dower, said: "It has sometimes been done by her separate deed, subsequent to her husband's sale, in which the sale is recited as a consideration on which she relinquishes her claim to dower. The deed of a *feme-covert*, thus executed to bar her claim to dower, is not voidable, but will bind her as to such claim." It is evident that if a husband may divest himself of his estate by one deed, and the wife of her dower therein by a subsequent and separate deed, the advantage gained by their joinder in the same deed is merely that of simplicity. It also follows that as the husband's original estate might have been transferred by an attorney in fact, a joinder in the deed of such attorney by the wife would bar her of her dower. *Stearns v. Swift*, 8 Pick. 536, advanced like views. But in both of these cases these expositions of the law were *dicta*. Upon the other hand, *Page v. Page*, 6 Cush. 196, presented the point for express determination. There, after a conveyance by a husband of his estate, the wife executed her subsequent separate deed professing to release her right to dower. The question was whether the right was destroyed. Referring to the cases of *Fowler v. Shearer* and *Stearns v. Swift*, *supra*, the court said: "If by the wife's separate deed, subsequent to her husband's sale, be meant a separate deed, executed by him and her jointly, in which she relinquishes her claim to dower in the land conveyed by him alone in the first deed or taken in execution against him, then we do not doubt that under the statutes of Wm. III. and 1783, dower might be barred by such deed. It was so decided in *Stearns v. Swift*, above cited, before the

revised statutes were passed, and is expressly so provided by those statutes: c. 60, sec. 7. But if by the wife's separate deed be meant a deed made by her alone, relinquishing dower in land previously conveyed by her husband alone, we are of opinion such a deed was not a bar to dower, under the statutes first mentioned."

It is indeed the universal language of the decisions, that statutes which permit the right of dower to be defeated by the joint deed of husband and wife, do not enable the destruction of the right by the successive separate deeds of the parties: *Moore v. Tisdale*, 5 T. B. Mon. 352; *Ulp v. Campbell*, 19 Pa. St. 361; *French v. Peters*, 35 Me. 396; *Shaw v. Russ*, 14 Id. 432; *Dodge Aycrigg*, 1 Beas. 82.

But if it is necessary to give validity to the conveyance of the wife of her right that the husband should join, it is difficult to see how she may bar herself by a joinder with her husband's attorney in fact, whose authority is exhausted once he has passed his principal's title. The case seems analogous to that in which the husband's attorney joins the wife in her deed of her own separate property, and that joinder it has been held avails nothing: *Toulmin v. Heidelberg*, 32 Miss. 268.

DOE, LESSEE OF FOSTER, v. EXECUTORS OF DUGAN.

[8 OHIO, 87.]

WHERE PARTIES CLAIM UNDER COMMON SOURCE of title, neither can impeach the title of the common ancestor.

ACKNOWLEDGMENT BY A SHERIFF, AFTER THE EXPIRATION of his term, of a deed executed while in office, is good, as having relation back to the time of execution.

MARGINAL NOTES OF A RECORDER appended to the record of a deed can not affect its validity, nor are they proof of the facts set forth therein.

ESTATE IN REMAINDER NOT EXTINGUISHED BY SALE IN PARTITION, WHEN.—

Where tenant for life obtains under proceedings in partition, in which the remainder is not represented, the interests in fee of other owners in the estate, upon payment to them of their share of the valuation of the property, and thereupon receives a deed purporting to convey, in addition to the interests which he has acquired by purchase, the fee in which he holds the particular estate, the remainder is not determined, but goes, upon his death, to the persons entitled.

EJECTMENT. The plaintiffs' lessors seek to recover the undivided one half of a lot in Cincinnati. In 1805, some of the then proprietors of the lot filed a petition seeking its partition. Under this petition such proceedings were had that the court finally allowed William Woodward and Samuel Foster to take it at a valuation assessed upon it by commissioners. Samuel Foster, who was already seised of a one-eighth interest in the lot, by right of his wife, obtained from the sheriff a deed of one half interest therein, upon his securing, to the satisfaction of owners of three eighths interests, their shares of the assessed valuation set upon the lot. The recorded sheriff's deed, from

which some of these facts appeared, had appended to it a marginal note by the recorder, purporting to show that it had been by mistake recorded before delivery. An objection raised to the regularity of these proceedings rested upon the fact that Hepsibeth Foster, wife of Samuel Foster, though a party to the original petition, died before any other proceedings were had, and so left the estate in remainder, dependent on the life estate which her husband held in her right, unrepresented. Other objections raised appear in the opinion.

V. Worthington, for the plaintiffs.

Fox and N. Wright, contra.

By Court, **LANE, J.** The defendants hold the estate of Samuel Foster. If he acquired a fee, by the proceedings in partition, it has passed to the defendants; but if his estate, in the half lot, or in any part of it, was for life only, and at his death passed to the heirs of his wife, the plaintiffs may recover it in this suit.

The mistake of the name of Mrs. Pillsbury in the petition, and the omission to name her husband, are of no moment in this case. If she should interpose her claim to her original share, other questions may arise. But if these litigants have any right to it, it must flow through the sheriff's deed, a common source of title, which neither is at liberty to contest: 5 Ohio, 197.¹ The estate which a husband holds in his wife's lands, as it may endure for life, and is determinable at no certain period, is a freehold: Co. Lit. 42 b, 351 a, 273 b, 325 b, n. 2. His estate is terminated at the death of the wife, unless the conditions exist, by which he retains the freehold, as tenant by the curtesy.

In view of the law, the holder of the freehold is the owner of the land. He is entitled to the possession and usufruct; chargeable with the feudal services under the old law; and, in more modern times, with the taxes and other burdens incident to land. As the interest for life and the remainder or reversion constitute but one fee, the law makes him the tenant to the *præcipe*, and intrusts him with the defense of suits brought to recover the land, with the privilege of praying their aid; and the record of a recovery, in a real action, in all cases where aid is prayed, and in some cases without it, is conclusive on their interests as privies: Co. Lit. *ut supra*, 362 a; 2 Bl. Com. 362; 3 Id. 193.

1. *Douglas v. Scott.*

A voluntary partition may be made by tenants for life, holding estates in joint tenancy or coparcenacy, when made by husbands, of wives' lands; if equal, it binds the inheritance. The writ *de partitione facienda* must be brought against such a tenant. It lies at common law against the tenant by the curtesy, although a stranger; and the benefit of this writ was given to him by the statute 32 Hen. VIII., c. 32: Lit., sec. 264; Co. Lit. 174 b, *et seq.*, and 171 a, n. 2.

The statute of 1804 (3 Stat. 378) gives to any joint tenant, tenant in common, a parcener, the right of making a partition, by petition to the court. Under this law, Samuel Foster, and his wife Hepsibeth, who was properly joined in the writ (Lit., sec. 256; Co. Lit. 170, 176), united with some of their co-tenants in the proceedings before us. During the life of his wife, Foster was a necessary party to represent her interest; by her death, his estate by the curtesy continued him the tenant of the freehold, without determining his right or interests.

The court having the case before them, proceeded to appoint commissioners to make partition, who reported that no division could be made without impairing the value of the land; leave was given to Woodward and Foster, two of the parties to the proceedings, to take it at appraisal. The statute gave to the sheriff authority to convey, which he has executed. The irregularities which are alleged to exist in these proceedings are not of such a character as to render them void, when questioned in this collateral way: 5 Ohio, 255; 7 Id. 257;¹ 2 Pet. 157;² 10 Id. 450.³

It is alleged, that the deed is defectively executed, it being acknowledged by "the late sheriff." The case shows, that the deed was made by the sheriff while in office; his subsequent acknowledgment, although after his term has expired, is carried back, by relation, to the time of execution.

The marginal note, made by the recorder on the registry, can not be admitted as evidence to affect the validity of the deed. When it was made does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is *functus officio*, and has lost his power over the subject.

We are therefore led to conclude that these proceedings must be taken as valid between these parties, and that Foster acquired the rights of Abigail Pillsbury, and Mary and Seth Cutter, under them. The plaintiffs urge, that as Foster was a

1. *Mitchell v. Eyster.*

2. *Thompson v. Tolmie.*

3. *Poorhess v. Bank of the United States*

party to the suit, as a tenant for life, of an estate, the remainder of which belonged to them, all his acquisitions were in that character, and should inure to their benefit after the determination of the particular estate. The soundness of this position is not admitted; Foster was a party to these proceedings in his own right, pursuing his own interests, in the course of which he acquired the lands of these co-tenants by purchase. He can not charge the remainder with the purchase money. It is not just that they should reap the benefit of his advancement, or enjoy that for which they have never paid.

The remaining eighth, the original share of Mrs. Foster, being already the property of Samuel, was not the subject of this sale. The interest of the remainder was not before the court, as no partition could separate it from the particular estate, and no money was professed to be paid for it. As the estate by curtesy has determined by the death of Foster, the remainder has become an estate in possession, and may be recovered in this suit.

Judgment for plaintiffs for one eighth.

The principal case has been cited in the cases below to the points appended. A judgment in a real action against a tenant to the *præcipe* seised of the freehold, bars all contingent estates dependent upon the estate of that tenant, and also all vested remainder-men made parties by aid prayer: *Campbell v. Watson*, 8 Ohio, 506. The record of a deed is *prima facie* evidence of its delivery: *Mitchell v. Ryan*, 3 Ohio St. 380. Where two parties claim under common source of title, neither may dispute the validity of the title of the common ancestor: *Ward v. McIntosh*, 12 Id. 240. Estate in remainder is not determined by the purchase by the tenant for life, under proceedings in partition, of the estates in fee, of other co-tenants in the common estate: *Foster v. Dennison*, 9 Ohio, 125. The case is also cited in *Pillsbury v. Dugan*, Id. 120.

WHERE TITLE IS TRACED FROM THE SAME SOURCE, neither party may dispute the title of the common ancestor: *Bedford v. Urquhart*, 28 Am. Dec. 137.

SHERIFF, AFTER EXPIRATION OF HIS TERM, may complete title, by execution of deed conveying the lands sold by him under execution while in office: *Allen v. Trimble*, 12 Am. Dec. 726.

LESSEE OF ARMSTRONG v. MCCOY.

[8 OHIO, 128.]

PRESUMPTION OF EXECUTION OF SHERIFF'S DEED, WHEN RAISED.—Where an execution sale is shown, and it also appears that an order of confirmation was entered, and the testimony of the sheriff is offered to the point that from his uniform habit in such cases he is certain that he must have executed the deed properly, there will, in case the deed itself can not be produced, be a presumption raised that it was executed in due form.

RECITALS IN A SHERIFF'S DEED need only show that he acted under the authority of an execution.

STATUTE PROVIDING FOR RECITAL of all executions issued upon a judgment, in the sheriff's deed, is merely directory in so far as it requires further recitals than are necessary to show the sheriff's authority.

EJECTMENT. It appeared that in the case of *West v. McCoy*, there had been an execution sale of the premises in controversy, that there had been a return of the sale, an order of confirmation, and that the sheriff executed a deed to the purchaser, Conger, and that Conger had been in possession subsequently for twenty years or more. The deposition of the sheriff acting at the time was also introduced, and was to the effect that from his uniform habit in such matters, he entertained no doubt that he had executed the deed in this case, and had it properly acknowledged and attested, and that further he had an impression that he had delivered the deed to Conger in his store. Conger, some time before the institution of this suit, abandoned possession, whereupon McCoy re-entered. Conger's title was afterwards sold on execution, and the sale perfected, but the deed to the purchaser failed to recite all the executions issued upon the judgment. It was the title under this deed that plaintiff's lessor represented.

Wilcox, for the plaintiff.

G. Swan, contra.

By Court, GRIMKE, J. If the evidence, in this case, related to a deed from one individual to another, there would be some reason to doubt whether it was sufficient to show a legal title in Conger. But it is, in this instance, combined with other circumstances, which contribute to raise a presumption exceedingly strong, that such a deed was actually executed. A distinction must be made between those cases where a deed, not produced, is the commencement and end of title in an individual, and those where the deed, having for its foundation a train of judicial proceedings, is only the consummation of that title. In the first instance, the testimony to supply the production has no necessary connection with the deed; in the second, it may constitute the whole authority for its execution, and may be evidence of a higher nature than the deed itself. In this case, there is proof of the sale, of the return by the sheriff, of the order of confirmation, and that the sheriff made the deed. We think that these facts, connected with the testimony of the witnesses, are sufficient to authorize the presumption that a valid deed was

made by the sheriff to Conger. This case is not stronger than that of *Jackson v. Woolsey*,¹ cited by the counsel for the plaintiff. In that case, it was decided that commissioners in partition, appointed to make a deed, might be presumed to have made one, pursuant to the order of the court. Nor is this case so strong as the case of *Tyburr v. Slade*,² 4 T. R. 682, where, trustees having been directed to convey to a devisee, on his attaining twenty-one years, it was held that a conveyance might be presumed any time afterwards.

It is objected to the sheriff's deed to Fox, in the case against Conger, that it does not recite all the executions that issued upon the judgment before the sale was effected. This objection is not maintainable. All that is necessary, is, that the deed show that the sheriff acted under the execution. This question has been repeatedly raised in New York, and it has been uniformly decided in favor of the sheriff's deed: 10 Johns. 381;³ 18 Id. 7.⁴ It is true, our statute declares that the executions shall be recited, and it is often very difficult to distinguish between those ceremonies which are directory to the officer, and those which are essential to the title. If any one general rule may be laid down, it is, that every prerequisite, which can be considered as constituting the foundation of title, is essential and indispensable, and that whatever does not partake of that character, is merely directory. The word recite is used in the statute long after it had obtained a technical, legal meaning, when applied to deeds. I refer to the well-known maxim, that recital is not a necessary part of a deed. But it is unnecessary to decide more than that the recital, which is contained in this deed, showing, as it does, a clear and undoubted authority for its execution, is sufficient.

Judgment for the plaintiff.

Cited to the effect that the statute providing for the recital in the sheriff's deeds of all executions issued on the judgment, is directory in so far as it requires anything more to be recited than is sufficient to show the sheriff's authority: *Perkins v. Dibble*, 10 Ohio, 437; *Bettison v. Budd*, 17 Ark. 558; *Humphry v. Beeson*, 1 Greene (Iowa), 214; *Ogden v. Walters*, 12 Kan. 290; *Buchanan v. Tracy*, 45 Mo. 440.

RECITALS NECESSARY IN SHERIFF'S DEED: *McGuire v. Kouns*, 18 Am. Dec. 187; *Dufour v. Camfranc*, 13 Id. 360.

1. 11 Johns. 446.

2. *England ex dem. Syburn v. Slade*.

3. *Jackson v. Pratt*.

4. *Jackson v. Davis*.

DEVISEES OF McCUNE v. HOUSE ET AL., ADM'RS.

[8 OHIO, 144.]

A WILL OF PERSONAL PROPERTY must be executed according to the law of the domicile of the testator at the time of his death.

A NUNCUPATIVE WILL CAN NOT REVOKE a prior written will or testament.

ISSUE out of chancery. Complainants claimed under a written will of David McCune, executed by him while a resident of the island of Jamaica. McCune after the execution of this will removed to Ohio, and here made a nuncupative will, under which defendants claimed, disposing of part of the property already bequeathed by the written will. The case was submitted upon the question whether the nuncupative will operated a revocation.

A. Nye, for the plaintiffs.

Vinton and Nash, contra.

By Court, GRIMKE, J. The proposition which is submitted to the consideration of the court, is whether a written will can be revoked by a subsequent nuncupative one. But as we have power to decide only cases, and not questions, we must decide, not whether a will, but whether the will made in the island of Jamaica was revoked by the will executed at Galliopolis. And this form of stating and determining the proposition, will not deprive the parties of any right, to which they would otherwise be entitled. The written will makes a disposition of the whole estate of the testator, and if the verbal will is legal, it will revoke the former disposition of the personal property. It was once a contested question, whether a will of personalty should be executed according to the law of the intestate's domicile, or of the place where the goods were situated. It was always admitted, that, in case of intestacy, the law of the intestate's domicile must regulate the distribution of his personal property. But a distinction was attempted to be made between a presumed intention in the one case, and an expressed one in the other; and it was supposed that it was only where a will is not expressed, that the law of the domicile was raised up to execute a presumed will. But inasmuch as personal property has no locality, but accompanies the person of the owner, the consequence necessarily is, that the voluntary disposition, as well as the distribution of it, must be governed exclusively by the law of the domicile. So that it is now received, as a settled principle, that if a will of personalty is made in a foreign country, and then the testator changes his

domicile, the will must be executed according to the law of the new domicile: 3 Meriv. 67.¹ The written will of Mr. McCune, therefore, although made in the island of Jamaica, must be governed by the law of Ohio. There does not appear to be any objection to its validity, on that ground; and thus is presented the single question, whether the subsequent nuncupative one has power to revoke it.

In England, before the statute of frauds, a written will might be revoked by a nuncupative testament; and it was in consequence of an atrocious conspiracy, to set up a nuncupative will over a prior written one, that the glaring defect in the law came to be perceived, and that the statute was passed. The history of the transaction is given in a note to *Mathews v. Warner*, 4 Ves. 196. Mr. Cole, three years before his death, had made a written will, giving three thousand pounds to charitable uses. Mrs. Cole set up a nuncupative will, by which the whole estate was given to her. Upon the trial, it appeared that most of the witnesses to this will were perjured, and that Mrs. Cole was guilty of subornation. And upon this occasion, Lord Nottingham said: "I hope to see, one day, a law, that no written will should be revoked, but by writing." The next year, the statute of frauds was passed. In England, then, a will of personalty, which need not be attested by witnesses, can not be revoked by a verbal testament.

The second section of our statute of 1831, directs that every will disposing of real or personal property shall be in writing, and attested by two witnesses. The fifth section declares, that any last will and testament shall be revoked by cancellation, or by subsequent will or codicil, made as aforesaid. The eleventh and twelfth sections authorize the making a nuncupative will. And thus, I believe, it will be found that we, in Ohio, have enacted the same salutary provision which is contained in the English statute of frauds; though it must be remembered that there are much stronger reasons why such a law should be established here than in Great Britain, as a will of personal property must here be attested by two witnesses. The fifth section of our act declares, that a will revoking a former will shall be executed as aforesaid. The wills before spoken of are those of real and personal estate, and thus the statute, by necessary implication, or rather by a plain and expressed intention, has declared that such revoking will shall also be in writing, and attested by two witnesses. For the clause which permits a nun-

1. *Pottinger v. Wightman*.

cupative will to be made is placed by itself, and postponed to the eleventh and twelfth sections, so that the words, as aforesaid, in the fifth section, can not, without confusing the whole arrangement of the testamentary clauses, be supposed to have any reference to the eleventh and twelfth sections. All our prior laws on this subject correspond with this view, and seem to have forbidden the revocation of a written by a nuncupative will. The act of 1808, in the first and second sections, declares how a written will shall be executed, but is not followed, as is the present law, by a section prescribing the manner of revocation. The third section directs how a nuncupative will shall be executed, and then provides that no such will shall revoke a written will. The act of 1808 is similar to the present statute. It declares how a will shall be revoked in a clause antecedent to that which gives power to make a nuncupative will. It omits the third section of the act of 1805, because the manner of revocation being defined in another section, such a declaration became unnecessary, and would have been supererogatory. In truth, there could not be any doubt about this matter, if it were not for a mere change in the arrangement of the sentences in these laws; which shows how important it is in framing a new statute not to indulge in any arbitrary change of even the form of an old one; since, if it does not lead to any ultimate difficulty, it is calculated to produce doubt, which should, as much as possible, be avoided.

There are very good reasons why an individual, he who has not yet executed a written will, should be permitted, under peculiar circumstances, to make a verbal one. But when he has already executed a written will, with all the solemnities of the law, there are equally strong reasons why the revocations of it should be attended with the same solemnities. It is not in restraint of this free action; it is to protect him from a fraudulent conspiracy, very likely to take place, where he has already disposed of his property, counter to the wishes of those who surround him. The frauds practiced in England gave rise to the enactment of the statute of frauds. The act of 1805 was framed in analogy to that law; and the act of 1831, with a design equally plain, has also forbidden the revocation of a written by an nuncupative will.

LAW OF DECEDENT'S DOMICILE determines the validity of his will of personalty: *Sorrey v. Bright*, 28 Am. Dec. 584, and cases cited in note.

NUNCUPATIVE WILLS are not favored, and are tolerated only upon proof of strict compliance with the statute: *Yarnall's will*, 26 Am. Dec. 115 and note, where the previous cases in this series are collected.

HEIRS OF FRENCH v. FRENCH ET AL.

[8 OHIO, 214.]

CONTRACT OBTAINED FROM A PERSON INTOXICATED to such degree that he can not consent understandingly, will in equity be decreed to be canceled.

WHERE PROOF HAS BEEN TAKEN IN AN EQUITY CASE, the plaintiff can not discontinue the suit with the right of bringing it anew, otherwise than by obtaining an order of the court, that the bill be dismissed without prejudice.

BILL in equity, seeking the rescission of a contract entered into by plaintiff's ancestor, upon grounds that appear in the opinion.

John C. Paine, for the complainant.

T. Ford and R. Hitchcock, contra.

By Court, GRIMKE, J. That a court of equity will interpose in such a case as that made by the bill, is too clear to be denied. It was once supposed to be the law, that a deed obtained from a drunken man could not, for that cause, be avoided. But a more rational rule now prevails; and the law now regarding the fact of intoxication, and not the cause or author of it, and regarding that fact as affording proof of a want of capacity to contract, which is one of the elements of every agreement, will interfere to relieve. Thus, if a deed is obtained by the exercise of an undue influence over a man whose mind is incapable of acting freely and voluntarily, such deed will be decreed to be canceled. The difficulty generally has been to settle what degree of intoxication is sufficient to show the want of a consenting understanding. And, as to that, it is evident that no universal rule can be laid down, since it is the deprivation of mind which the law has regard to, which may be very different in different individuals under the same circumstances of intoxication. But the plaintiff has failed to substantiate the case made in his bill. He has, to be sure, adduced testimony, which, if it were not counterbalanced by the testimony taken by the defendant, might be sufficient to induce very strong doubts, whether there had not been great unfairness in the transaction; but all his allegations are met by evidence direct and positive, and which take from the court the power to decree a rescission and cancellation of this deed. It must be an exceedingly strong case, which would authorize the annulling an executed agreement; indeed,

the distinction between a bill to perform and to rescind even an executory contract is too familiar to need to be repeated.

Before dismissing the bill, it is necessary to notice one fact of the case, which has occasioned us some difficulty. It appears that there was a former suit between the same parties, and in regard to the same subject-matter, and that after proof had been taken, and the cause was ready for hearing, that the complainant voluntarily discontinued his suit. The term discontinuance is one which is exclusively known in proceedings at law, and the complainant should regularly, if he intended not to preclude himself from the privilege of instituting a new one, to have had the bill dismissed without prejudice. In *Gichell v. Logan*,¹ 14 Ves. 232, Lord Eldon says: "If a party thinks proper to bring his cause to a hearing upon examination of witnesses, publication passed, and the cause capable of being opened, and then makes default, it is very difficult, and would be rather mischievous, to treat such conduct merely as a nonsuit at law. But the defendant," he says, "has waived the benefit that may have arisen from the former decree by not pleading it." We have not considered the former decree as a bar; but a conformity to the established practice in chancery, as well as safety to all concerned, demands that, in future, the bill should be dismissed without prejudice, instead of being entered discontinued.

INTOXICATION, HOW FAR AFFECTS VALIDITY OF A CONTRACT: *Oram v. Conklin*, 22 Am. Dec. 519 and note, where prior cases in this series are collected.

LESSEE OF HILL v. WEST.

[8 OHIO, 222.]

DEED OF RELEASE OF A MORTGAGEE TO HIS MORTGAGOR vests no new title in the latter, who will continue to hold by his original title, and therefore subject to the lien of any mortgages executed by him subsequent to the date of his mortgage to the mortgagee from whom he has obtained the release.

COVENANTS OF WARRANTY OF A FEME-COVERT in a deed of her real estate, will operate as an estoppel to her asserting any subsequently acquired title to the land.

EJECTMENT. The opinion states the case.

Webb, for the plaintiff.

Powers, contra.

1. *Pickett v. Loggen*.

By Court, HITCHCOCK, J. On the trial of this case an objection was made to the deed from M. and A. Wilcox and their wives, to Hurd and wife, on the ground that no consideration passed at the time the deed was executed. From the circumstances attending that transaction it is clear that the object was to transfer this land to the women, and that Hurd was made use of as the instrument through whom this might be done. But the testimony in the case shows, that M. and A. Wilcox had received and made use of the separate property of their wives for their own purposes, and it was not improper for them to make this settlement upon them, especially as there is no evidence of any design to defraud creditors. If there was anything of this kind, it might make a proper case for the interference of a court of equity.

The facts of the case show that the whole four thousand acres of land, including the land in controversy, was mortgaged to the grantees of the defendants, in April, 1823. The two hundred acres were mortgaged to the lessor of the plaintiff, in the month of November of the same year. Both mortgage deeds were executed by Moses and Aaron and Huldah and Mabel Wilcox. The mortgagors, in the first mortgage, on the seventeenth of July, 1824, released all their interest in the two hundred acres in controversy to the two women.

The first question presented for consideration, under this state of facts, is as to the effect of this release. If a mortgagor is considered as having the legal interest in the lands mortgaged, until the condition broken—and that he is to be so considered as to all the world, except the mortgagee, has been repeatedly decided by this court—then upon the performance of the condition his estate becomes indefeasible. If the condition of defeasance be the payment of money, such payment destroys the interest of the mortgagee in the lands, and such payment may be proven by parol. By the act of the twelfth of March, 1836, “to amend the act entitled an act to provide for the proof and acknowledgment of deeds,” etc., 34 Ohio L. 19, it is provided, that an entry of satisfaction by the mortgagee upon the mortgage, or upon the record of the mortgage, shall operate as a release of the same to any person who may be entitled to a release. A deed of release, executed by the mortgagee, of all his interest in the mortgaged premises, must be at least equivalent to the performance of the condition. As the payment of the money secured by a mortgage does not vest a new estate in the mortgagor, but

merely extinguishes the lien of the mortgagee, so a release of the premises by the mortgagee to the mortgagor vests no new estate. The release operates to extinguish the claim of the mortgagee, and the mortgagor is under his original title, not under a title acquired by the release. A mortgagee has not, even after the condition of defeasance has been broken, such an interest in the mortgaged premises, that he can convey by release or other mode of conveyance to a third person, until the equity of redemption is foreclosed, unless he, at the same time, transfers the debt secured by the mortgage. Neither can lands in the hands of the mortgagee be sold on execution, until the equity of redemption is foreclosed: 4 Johns. 41;¹ 5 Johns. Ch. 570.² If we are right in this, then, it follows, the release to Hannah and Mabel Wilcox operates as an extinguishment of the first mortgage, so far as the same was operative upon the two hundred acres of land released.

They acquired no new title by this release, but held the lands in the same manner, and under the same title, as before the execution of this mortgage, and entirely divested of its lien; still the subsequent mortgage to Hill was outstanding. At the time it was executed, the mortgagors had such an interest in the land as could be pledged. It operated as a lien as perfectly as the prior mortgage, except that it was junior in point of time. The former mortgage having been extinguished, this attached as a lien upon the land, as it would have done had that never been executed; and the equity of redemption having been foreclosed, the mortgagee is vested with the legal title.

But if we are wrong in this, and these women are to be considered as having acquired a new title or estate by the release, then the question arises, whether they, or those claiming under them, are not estopped by the covenants in their deed from setting up this title against the lessor of the plaintiff. At the time the deed to the lessor of the plaintiff was executed, they were *femes-covert*, and as such could not be bound by their contracts, except so far as expressly authorized by statute. In this, as in most, if not all, the states of the union, *femes-covert* are allowed to convey their real estate by deed, their husbands uniting in the conveyance. What in England can be done only by fine, may in this country be done by deed thus executed. By our law, however, in order to give the deed validity, the wife must be examined separate and apart from her husband, and after such separate examination, must acknowledge the deed. This separate

1. *Jackson v. Willard*.

2. *Aymar v. Bell*.

examination seems to be substituted for the fine; still, although in England a *feme-covert* can, by fine, enter into covenants, which will subject her to actions for damages, yet we are not prepared to say, that under our system she is bound to this extent by her covenants in a deed of conveyance. On the contrary, we incline to the opinion that she is not thus bound. It seems to be holden otherwise, however, in Virginia. In the case of *Nelson v. Harwood*, 3 Call, 394, it was decided, that if a *feme-covert* was privily examined, her covenant in a deed for further assurance is obligatory, and the specific performance of such covenant was decreed. Notwithstanding this case, however, we entertain the opinion, that full effect is given to the statute providing "for the proof, acknowledgment, and recording of deeds," etc. (29 Ohio L. 346), when we hold that deed, executed by a *feme-covert*, in conformity with that act, operates to convey the estate contemplated.

It is not necessary, however, definitively to settle this question, nor do we intend to do it; for it does not follow, because a *feme-covert* could not be made liable in damages for the breach of her covenant of warranty, that, therefore, such covenants will not operate as an estoppel. We are aware, that in the case of *Jackson v. Vanderheyden*, 17 Johns. 167 [8 Am. Dec. 878], Judge Spencer, in delivering the opinion of the court, says, that a deed executed by a *feme-covert*, in conjunction with her husband, containing covenants of general warranty, does not operate as an estoppel to her subsequently acquired interest in the same lands. This, however, is the only American case we have found sustaining the same doctrine. On the contrary, in the case of *Collard et al. v. Swan and Wife*,¹ 7 Mass. 291, it is expressly decided, that where a wife joins with her husband in the conveyance of her lands with covenants of warranty, the land passes by the deed, and the wife is estopped by her covenants, although she is not answerable for any breach of them. The same principle is recognized in the case of *Fowler v. Spencer*,² 7 Id. 21. Such seems also to be the rule of decision in Kentucky: 4 Bibb, 436.³

These decisions may not seem to be founded upon the reasons which are usually assigned, why the covenants in a deed should operate by way of estoppel—that is, to prevent circuitry of actions—still they seem to us to be reasonable, and such as tend to the furtherance of justice; and when a married woman undertakes, in conjunction with her husband, to convey her land

1. *Collard et al. v. Swan and Wife*.

2. *Fowler v. Shearer*.

3. *Massie v. Sebastian*.

with covenants of warranty, it is sufficient to protect her from the payment of damages for the breach of those covenants; for all other purposes they should be held operative. If, then, after the execution of a deed to the lessor of the plaintiff, Huldah and Mabel Wilcox acquired title to the premises in controversy, that title inured to the benefit of the lessor of the plaintiff, and neither they nor those claiming under them shall be permitted to defeat the plaintiff by setting up this after-acquired title.

Motion for new trial overruled.

Cited as authority to the effect that the discharge of the mortgage debt extinguishes the interest of the mortgagee in the land: *Perkins v. Dibble*, 10 Ohio, 440. And to the point that the covenants of warranty of a married woman estop her from asserting a subsequently acquired title: *King v. Rea*, 56 Ind. 1.

FEME-COVERT'S COVENANT OF WARRANTY was held not to estop her from asserting a subsequently acquired title, in *Martin v. Dwelly*, 21 Am. Dec. 244. In *Wadleigh v. Glines*, 23 Id. 705, it was held that such covenants could not be the foundation of the personal action of covenant.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

GARRET v. REX.

[6 WATTS, 14.]

GIFT OF THE PRODUCE OR INTEREST of a fund without limitation as to the extent of its duration is, *prima facie*, a gift of that produce or interest in perpetuity, and is consequently a gift of the fund itself.

ERROR to the common pleas of Lebanon county. Action brought by John Garret, administrator of Sophia Garret, against Abraham Rex, executor of Samuel Rex, who was executor of Jacob Umbehand, to determine whether Sophia Garret, who was the daughter of Umbehand, was entitled to any portion of three hundred pounds which the latter had directed in his will to be placed at interest, and the interest paid yearly to his wife Susannah. The clause of the will directing the interest to be paid to the wife, as well as another portion of the will necessary to an understanding of the case, is stated in the opinion. The court being of opinion that plaintiff was not entitled to any portion of the money, gave judgment for the defendant.

Weidman, for the plaintiff in error.

Pearson, contra.

By Court, **KENNEDY, J.** This case appears to fall within the rule laid down by Mr. Roper in his work on legacies, vol. 2, p. 381; that where the interest or produce of a legacy is given to, or in trust for a legatee, or for the separate use of such legatee, without limitation as to continuance, the principal will be considered as bequeathed also. The authorities referred to by Mr. Roper in support of this rule seem to establish it beyond all

doubt in England. And the cases of *Hellman v. Hellman*, 4 Rawle, 450, and *Schrivver v. Cobeau*, 4 Watts, 130, show that it has been received and adopted here. The distinction in this respect between a devise of realty and a bequest of personalty seems to be, that, in the former, words of limitation must be added to give more than an estate for life; but in the latter, words of qualification are required to restrain the intent and duration of the interest. A gift of the produce of a fund is, *prima facie*, a gift of that produce in perpetuity; and is consequently a gift of the fund itself, says Sir William Grant, in *Adamson v. Armitage*, 19 Ves. 416. Unless, therefore, it shall appear either from the nature of the subject, or the context of the will, that the produce or interest of the fund alone was intended for the legatee, the gift of the interest will pass the principal.

In the case before us, the intention of the testator, so far as it can be collected from the will, which is the only evidence that can be received of it, appears to be in accordance with the rule. The bequest of the interest upon the three hundred pounds to his wife, is, in the first place, absolute and unqualified. The words of it are: "My said executor shall put three hundred pounds of my money out at interest, from the fifteenth day of April next, for my said wife, and yearly pay her the interest." These three hundred pounds do not appear to be mentioned or even alluded to again in any other part of the will, with a view to make any other or further disposition of either the principal or interest thereof; yet it is evident from the conclusion of his will, that the testator not only intended thereby to dispose of all his estate; but that he thought he had done so, when he directed in the following words: "My said executor shall then take an inventory of my movable effects, not hereinbefore given, and shall convert the same into money, by public vendue, and the said money, as also the cash in the house, and out on bonds and notes, etc., shall by my executor be equally divided between my said four children (which were all the children he had), in equal shares, and the grain that may be in the ground the next spring, to remain with my said plantation, and what I have hereunto given my said wife and each of my said children, shall be in full of their and each of their shares and estate in my said estate."

Judgment affirmed.

GIFT OF THE PRODUCT OF A FUND.—The principal case is cited in *Campbell v. Gilbert*, 6 Whart. 77; *Myers v. Byerly*, 45 Pa. St. 368, and *Roberts' appeal*, 59

Id. 73, upon the point that *prima facie* the gift of the product of a fund is a gift of that product in perpetuity, and consequently a gift of the fund itself. In *Sheaffer's appeal*, 8 Id. 41, the rule adopted in the principal case was held not to apply, where, from the nature of the subject or the context of the will, it appears that interest only was intended for the legatee.

EAGLE v. EICHELBERGER.

[6 WATTS, 29.]

WHERE GOODS ARE PURCHASED IN A RETAIL STORE, it is necessary, in order to vest the title in the vendee, and make the sale valid as against the creditors of the vendor, that the goods sold should be separated from the bulk of the other goods, and that possession should be delivered with as little delay as is consistent with the nature of the articles purchased.

TRESPASS, brought by Eagle against Eichelberger, sheriff of York county, for levying upon and selling certain property upon an execution against C. F. Laise. Eagle lived in Columbia, Lancaster county, and Laise kept a store in York county. Plaintiff purchased certain goods of Laise, which the latter was to deliver the first time he went to Columbia with his boat, which he kept for delivery purposes. The goods were sold on Monday, August 4, 1834, and the boat was to go to Columbia the following Thursday. The goods sold were charged to Eagle, but were not separated from the bulk of the other goods in the store. The levy was made before the goods were delivered and while they yet remained in the store. The other facts are stated in the opinion.

R. J. Fisher, for the plaintiff in error.

Mayer and Evans, contra.

By COURT. The law of the case is settled, as far as it can be so, by judicial decision; and it would be mischievous to disturb it. The direction was accordant to the principles heretofore laid down, and we perceive no error. In respect to the flaxseed, the sale was conclusively fraudulent. It was not purchased as of any particular quantity, but was to be measured when received at Columbia; and, as the plaintiff was to pay only for what he should get, what was there in the bargain to prevent the vendor, in the mean time, from selling at least a part of it to his customers? With the fairest intentions on the part of the plaintiff, the sale might have been used as a cover. In fact, it appears to have been incomplete even between the parties, and to have been no more than a contract to sell. But

it is also a strong feature that the goods were not separated from the bulk of the others in the store. A man who pays for a coat pattern, acquires no property in the piece before his part is measured and cut off. Necessity requires that these incomplete sales by retail storekeepers, be strictly construed; for it would lead to great abuse if their customers were liable to be prejudiced by the negligence of those who preceded them.

Judgment affirmed.

Cited, in *Winslow v. Leonard*, 24 Pa. St. 16, upon the point that where anything remains to be done in a sale of personalty, as, for instance, separating the articles intended to be sold from a lot of similar articles, there is no perfect sale. In *Chase v. Ralston*, 30 Pa. St. 541, it was held proper for the court to determine in certain cases that a sale was fraudulent because the vendor was allowed to retain possession longer than was consistent with the nature of the articles purchased, citing the principal case.

POSSESSION BY VENDOR ON SALE OF CHATTELS.—Where the vendee of personal property suffers the vendor to remain in possession, this is evidence of fraud as against the creditor of the vendor, or a *bona fide* purchaser, whether the sale be absolute or conditional; and unless a sufficient excuse be shown to and approved by the court, that evidence is conclusive: *Swift v. Thompson*, 21 Am. Dec. 718. See *Moore v. Kelley*, 26 Id. 283. In Pennsylvania the detention by the vendor is held to be fraud *per se*: *Clow v. Woods*, 9 Id. 346, 357, note; *Babb v. Clemson*, 13 Id. 684, 691, note. In Massachusetts, New York, Connecticut, Kentucky, and Tennessee, the retention of such possession is considered as *prima facie* evidence of fraud, but not fraud *per se*: *Brooks v. Powers*, 8 Id. 99; *Sturtevant v. Ballard*, 6 Id. 287, note; *Patten v. Smith*, 10 Id. 166; *Mason v. Baker*, Id. 724; *Callen v. Thompson*, 24 Id. 587.

DELIVERY OF CHATTELS, WHAT IS SUFFICIENT, ON A SALE OF: *Pleasant v. Pendleton*, 18 Am. Dec. 726; *Shumway v. Rutter*, 19 Id. 340; *Moore v. Kelley*, 26 Id. 283.

BROWN v. McCORMICK.

[6 WATTS, 60.]

WHEN A PERSON CONVEYS LAND in which he has no interest at the time, but afterwards acquires a title thereto, he will not be permitted to claim in opposition to his deed from the grantee, or any person claiming under him.

BONDS WITH A WARRANT OF ATTORNEY to confess judgment given to secure the purchase money of land, are but a personal security until judgment is entered upon them, and create no lien upon the land sold.

EJECTMENT for fifty acres of land, brought by Brown against McCormick. The facts are stated in the opinion. Judgment for defendant.

J. A. Fisher, for the plaintiff in error.

Dunlop, for the defendant in error.

By Court, ROGERS, J. The facts, so far as they are material, are these: On the second of January, 1788, Robert McConnel, who claimed the land in dispute, under a survey, in the name of Robert McConahey, with his wife, made a conveyance of the same, with a covenant of seisin and general warranty, to William Harvey. On the sixteenth of November, 1797, Uriah Brown, David Brown, and Mercer Brown, under whom the plaintiffs claim, made a deed, including the same premises, to Robert McConnel, the grantor above named. To secure the payment of the consideration, on the same day McConnel executed four bonds, with warrants of attorney to confess judgment, to David Brown, Uriah Brown, and Mercer Brown, severally, on which judgments were entered on the twenty-second of November, 1797. A *venditioni exponas* issued to January term, 1805, by virtue of which the land was sold to David Brown, who received a deed from the sheriff, the sixth of April, 1805. The first question is, as to the legal effect of the deeds, which the court decided was to pass immediately to Harvey, all the right which Robert McConnel acquired in the land by virtue of the deed from the Browns to him. And this is a principle too well settled to admit of dispute. When a person conveys land in which he has no interest at the time, but afterwards acquires a title to the same land, he will not be permitted to claim in opposition to his deed, from the grantee, or any person claiming title from the grantee: 12 Johns. 207;¹ 11 Id. 91;² Co Lit. 265.

The operation of the principle is, that immediately on the execution of the deed of the tenth of November, 1797, from David Brown and others, to Robert McConnel, it inured to the benefit of William Harvey, the grantee of the land, by virtue of the previous deed of the second of January, 1788. At that period, therefore, by operation of law, William Harvey was the owner of the premises in question; and the legal effect will be the same, whatever may have been the intention of McConnel in making the purchase from Brown, although the presumption undoubtedly is, that it was intended in good faith, to carry into effect his sale to William Harvey. But it is alleged, that the judgment on which the plaintiffs claim, being for the purchase money, although not entered until six days after the conveyance, is a lien on the property, conveyed by Brown to McConnel. But bonds, with a warrant of attorney to confess judgment, although given to secure the purchase

1. *Heyt v. Hudson*.2. *Jackson v. Matsdorf*; S. C., 6 Am. Dec. 355.

money, are but a personal security, until judgment entered, and consequently after the delivery of the deed, and before the judgment had, the grantor had no lien. In the intermediate time, it was in the power of McConnel to make any disposition of the land he pleased, either by sale, or by subjecting the premises to the lien of other incumbrances. And this consequence, the vendor can only avoid, by entering his judgment the same day the deed is delivered, or by taking a mortgage on the property sold, for security of the purchase money. The counsel for the plaintiff in error relies on *Chew v. Barnet*, 11 Serg. & R. 389; but that case merely decides the general principle that the purchaser of an equitable title takes it subject to all the countervailing equities to which it was subject in the hands of the person from whom he purchased. But here, by the conveyance from Brown to McConnel, McConnel acquires a legal title to the premises, without the lien of any incumbrance whatever, whether legal or equitable, which by operation of law, immediately passes to his grantee.

Judgment affirmed.

Cited with approval in *Robertson v. Robertson*, 9 Watts, 43; *Washabaugh v. Entriiken*, 34 Pa. St. 74; *Shollenberger v. Filbert*, 14 Id.; and *Clark v. Martin*, 49 Id. 303, upon the point that where one attempts to sell an estate which he does not own, and afterwards acquires title thereto, such title will inure to the benefit of the grantee.

WALKER v. QUIGG.

[6 WATTS, 87.]

A DEVISE OF ALL THE ESTATE of a person to his wife, to act with it according to her own discretion, consistent with the welfare of the children of the deceased, and in event of her marriage "she shall then claim no greater a right to my estate than one of the least of my surviving children," vests in her the entire estate during her widowhood in trust for herself and children, and upon her marriage the trust ceases, and she becomes entitled to an equal share of the estate, in common with her children.

PURCHASER OF LAND, KNOWING THE TITLE TO BE DEFECTIVE, buys at his own risk, and he is not entitled to compensation from the rightful owner for improvements placed upon it, who seeks to recover the land in ejectment, although the latter may have known that the improvements were being made, and made no objection.

WHERE AN EXECUTOR, claiming to be a devisee of certain land, sold it without express authority and applied the money to the payment of debts of the testator, those who are, upon a proper construction of the will, entitled to the land, may recover it from the purchaser without refunding the money paid.

EXHIBITION, for nineteen acres of land, brought by William, Rebecca, Eliza, and Catherine Quigg, and John Wesley, by their guardian, William Quigg, against Samuel Walker. John Quigg died seised of the land, leaving his widow, Elizabeth, and eight children; the title of the latter was vested in plaintiffs prior to the commencement of this action. Walker claimed by deed from Elizabeth, the widow. The will of the deceased John Quigg provided, "that all my estate, real and personal (or as the case may be), in Dauphin county, shall be given to my beloved wife, Elizabeth: she or her attorney shall act with it according to their discretion, as far as is consistent with the children's welfare. In case she, after my decease, gets married, she shall then claim no greater right to my estate than one of the least of my surviving children." Plaintiffs recovered seven eighths of the land in dispute. The other facts are stated in the opinion.

McClure, for the plaintiff in error.

McCormick, for the defendants in error.

By Court, **KENNEDY, J.** The first error assigned is, an exception to the charge of the court below to the jury, in giving a construction to the will of John Quigg, deceased, against the plaintiff in error's claim to the land in dispute, under which will both parties claimed the land. We are of opinion that the court were right in their construction of the devise to the wife of the testator, and the authority given by the will to her over his land or real estate. The intention of the testator, as disclosed by the terms of the will itself, must govern and rule the construction of it, seeing that it does not appear that the testator intended anything contrary to law. It is pretty clear that he did not intend to invest his wife with a fee-simple estate in the whole of the land; for, although he gives her or her attorney authority to act with the estate according to their discretion, yet he very distinctly limits and restrains the exercise of the power and discretion given, in two respects; which shows clearly that he neither intended to give her a fee in the land, nor yet the power to sell and dispose of it.

First, the estate was to be acted with; that is, managed, as I take it, by her, so far as should be consistent with the welfare of his children: in other words, for the benefit of the children, jointly with herself. That she was to have a joint interest or an equal interest, in common with the children, from the first, is plainly inferable from the provision expressly made in her

favor, in case of her subsequent marriage; for it can not be reasonably supposed that he intended to increase her interest in the estate upon that event: nor do I think, from the tenor of the will, that it was his design to curtail it, but merely to take from her the care and management of the estate, so far as the children's interests were concerned in it. Beside, had the testator intended to have vested her with the fee, his authorizing her to act in regard to the estate by attorney, would have been wholly unnecessary, and, as it appears to me, would have been so considered by the most simple and ignorant man in being, having sufficient capacity to dispose of his estate by will. It is only necessary to give an authority to act by attorney where a mere naked power is conferred, without any interest or estate whatever. In the second place, the power given to the widow over the whole estate, was only to be exercised by her as long as she should remain unmarried; at the end of which period she was to have a child's share, and such power only as should necessarily be connected with that interest or share in the estate. There being eight children, her portion in the whole estate was therefore restricted to one equal undivided ninth part thereof. It is plain, therefore, that the testator could not, at most, have intended to do more than make his wife a trustee of the whole estate during her widowhood, for the purpose merely of taking care of and managing it for the benefit of herself and the children: but if she married, then the trust was to determine, and her authority over the estate was to be at an end, so far as regarded the interests of the children therein. The testator doubtless thought that the subsequent marriage of his wife would at least interfere with her power, if not her inclination, to manage and use the estate for the welfare and benefit of his children, in the way he wished, and therefore was unwilling that she should be intrusted with it longer.

It is contended, however, that though she may not have been invested by the will with the title to the whole estate in fee, yet she had the power given to her during her widowhood, to sell and convey the land in fee. But, unless such power be plainly given by the will, or otherwise necessary to be exercised, in order to carry the express provisions thereof into effect, it can not be considered as thereby granted. It is perfectly obvious, that in terms no such power is given by the will: and it is equally clear, that nothing is thereby required to be done, which required the exercise of it. By the language of the will, "she and her attorney were to act with it (that is the estate)

according to their discretion, as far as was consistent with the children's welfare." These are the terms in which all the power granted to her is contained, and it would certainly be going too far to say that a sale of the land is thereby either expressly or impliedly authorized. In ordinary cases, it has never been supposed that a power given to take care of a fee-simple estate in lands, and to manage the same without more for the welfare of others, which is the most that was granted here, gave an authority to change entirely the character of the estate, by converting it from real into personal estate. It is evident, therefore, that the widow had no power to sell and convey in fee, more than one ninth of the land in question.

The second error is an exception to the rejection of evidence offered by the plaintiff in error. But the evidence, although rejected by the court, when first offered, was received afterwards in the course of the trial, which removes all ground of complaint on account of the rejection of it at first.

The third and last error is, that "the court erred in taking the equity of the cause, and the question of compensation to the defendant (that is the plaintiff in error) from the jury, and deciding the fact themselves." That part of the charge of the court below, to which this error has reference, is in the following words: "There is no equity disclosed by the defendant, either in his payment of the money (meaning the purchase money which he paid the widow for the land), or in making improvements in the presence of the plaintiffs, by reason of which plaintiffs should be barred of recovery, or required to make compensation to defendant."

The only question raised here, is whether, admitting the facts to be true, which the testimony of the defendant below had a tendency to prove, was the charge of the court to the jury correct in regard to the law and equity growing out of them? For it can not be questioned that it is the province of the court, and not that of the jury, to decide all questions of both law and equity. The facts, however, upon which questions of law and equity arise, if disputed, belong exclusively, on the trial of jury causes, to the jury, and are to be decided by them; but as to questions of law and equity when connected with the trial of issues by a jury, the latter are bound to receive their instruction from the court in regard to them. It being the duty then of the court to instruct the jury both in regard to the law and the equity of the case, we think the court below were right in advising the jury as they did on this branch of it. The

plaintiff in error must be presumed to have seen and read the will of John Quigg before he bought the land in controversy, because his deed of conveyance refers to it, and the widow pretended to have no other title to the land, or power to sell it, than what she derived from the will itself. But having seen the will, the plaintiff in error also saw the title, and the interest which the defendants in error had under it in the land. He therefore bought with his eyes open, and with full notice of their rights in the land; consequently, he must be considered as having taken upon himself all the risk that he might have to encounter thereafter on account of their title. What reason then has he to complain that the plaintiffs stood by, as it were, and gave him no notice of their rights or claims to the land? For since he knew, or at least ought to have known, which is the same thing, that they had a right to the land, he had no reason to presume or to conclude that they intended to abandon or give it up, either to him or their mother. Indeed, it would seem as if he bought of the widow, without having even the slightest pretense for alleging now that he did it under a mistake or misapprehension of her power under the will to sell; for he called his own counsel up on the trial of the cause to prove, and he testified, too, that at the time the deed of conveyance was executed and delivered by the widow to the plaintiff in error, he expressed some doubts about the title, and that William Walker, his son, who had become the husband of one of the daughters of the testator, being present, "agreed to indemnify his father against the claim of Quigg's heirs, if there should be any difficulty about it."

By this evidence, the plaintiff in error defeated William Quigg, one of the plaintiffs below, in recovering the share of the wife of William Walker in the testator's estate, which he had purchased of her and her husband before commencing this action. But not content with this, he wished also to defeat all the others, unless they would first refund to him the purchase money actually paid by him for the land, and pay him also for all improvements made on it. If such a principle were to be tolerated or sanctioned, owners of lands might be in danger of being improved out of their titles and rights to them; or lose them by a stranger's selling them, unless they reimbursed the purchaser the price paid by him for them, which might happen to be the full value of them, and consequently, in such case, equivalent to a loss of the lands by the owners: and this, in a

case where the purchaser had notice of the real owner's rights, would be monstrous.

But it is argued here that the purchase money, or at least upwards of two hundred dollars of it, when received by the widow, were applied by her towards paying some of the debts of the testator; and as these debts were a lien upon the land, equity requires that the defendants in error, should at least reimburse this money to the plaintiff in error. But the widow had no authority to sell the land to raise money for such purpose; and as well might it be said, that any stranger who voluntarily pays the debt of another, thereby acquires a claim in equity against the debtor, and if by any means he can get either the money or the property of such debtor into his hands, he will have a right to retain it, until he shall be reimbursed the amount of the money voluntarily paid in discharge of the debt, because by paying the debt he paid what the debtor was bound and might have been compelled to pay. Such a doctrine, if it were to obtain, would render it unnecessary for administrators or executors to apply to the orphans' courts for authority to sell the lands of their intestates or testators to raise money to pay the debts of their decedents, where the personal assets are insufficient for that purpose; because, if the heirs of the intestate or the devisees of the testator, after a sale of the lands by the administrators or the executors, without any authority from the orphans' court, or the will, but made for a full price, can not recover the lands from the purchaser, without reimbursing him the purchase money paid by him, then they have in effect lost their lands. For they may as well go and buy any other lands as give a full price to get possession of their own.

Judgment affirmed.

Cited in *Rohr v. Kindt*, 3 Watts & S. 565, to the effect that one who purchases a tract of land, knowing the title to be defective, takes the risk upon himself. Also in *Menges v. Oyster*, 4 Id. 23, upon the point that the children of a testator are not bound to reimburse purchase money applied to their father's debts by an executor who had sold the land under what was erroneously thought to be a testamentary power, because the payment is voluntary. In *Cornell v. Lovett's Ex'r*, 35 Pa. St. 103, the principal case and others were cited and reviewed, and it was held that a condition which provided that certain yearly bequests should be paid to the testator's widow as long as she remained unmarried, was valid, and that upon her again marrying the bequests ceased.

COMPENSATION FOR IMPROVEMENTS.—An occupant of land acquired *mala fide* or with notice of an adverse claim, is not entitled to be compensated for improvements in an action of ejectment: *Jackson v. Loomis*, 15 Am. Dec. 351, and cases there cited.

BLYMIRE v. BOISTLE.

[6 WATTS, 182.]

WHERE A PERSON PAYS MONEY to another for the use of a third person, or, having money belonging to another, agrees with that other to pay it to a third person, an action lies by the latter to recover the money.

WHERE, HOWEVER, THE CONTRACT IS FOR THE BENEFIT of the contracting party, such third person is a stranger to the contract and consideration, and an action can be maintained by the promisee only.

CASE, brought by John Boistle against Abraham Blymire. Plaintiff had judgment. The facts are stated in the opinion.

Williamson, for the plaintiff in error.

Brandeberry and Alexander, contra.

By Court, SERGEANT, J. Numerous cases are to be found in the books respecting the right of a third person to sue on a promise made to another, and they are not all reconcilable with each other: See 1 Vin. Abr. 333-337, and the note to *Pigott v. Thompson*, 3 East, 119. They seem, however, to warrant this distinction, that if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee: *Owings v. Owings*, 1 Har. & G. 484. In *Hadves v. Levit*, Het. 176, the distinction is drawn by Hutton, J., who says there is a difference where the promise is to perform to one who is not interested in the cause, and when he hath an interest. In the first case, he to whom the promise is made shall have the action, and not he to whom the promise is to be performed. In *Bourn v. Mason et al.*, 1 Vent. 6, in assumpsit, the plaintiff declared that one Parrie was indebted to the plaintiff and the defendant, in two several sums of money, and a stranger was indebted in another sum to Parrie; that there being a communication between them, the defendants, in consideration that Parrie would permit them to sue in his name the stranger, for the sum due him, promised they would pay the sum which Parrie owed to the plaintiff; and alleged that Parrie permitted them to sue, and they recovered. Verdict for plaintiff, and judgment arrested, because the plaintiff could not bring the action; for he was a stranger to the consideration, he did nothing of trouble to himself, or benefit to the defendant. In 2 Keb. 528, the same

case is reported, and the court conclude by saying, that he to whom the promise was made must bring the action, and the plaintiff hath still remedy against him. In 1 Stra. 592, is the case of *How v. Rogers*,¹ much resembling the present. Assumpsit, that whereas J. Hardy was indebted to the plaintiff in seventy pounds, upon a discourse between Hardy and the defendant, it was agreed, that the defendant should pay the plaintiff's debt, and Hardy should make the defendant a title to a house; and then averred that Hardy was always ready to perform his part of the agreement, and the defendant, in consideration, promised to pay the plaintiff. Judgment was given for the defendant after advisement; the court holding the plaintiff a stranger to the consideration.

When the grounds of the above-mentioned distinction are examined, there appear to be reasons of substantial justice in favor of it, as well as the authority of decided cases. Where one person contracts with another to pay money to a third, or to deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand, or recover it by action. But when a debt already exists from one person to another, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity; and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice.

The case before us, in substance is, that the defendant, Blymire, in consideration of Gladstone's conveying his third part of a lot of ground to him, promised Gladstone to pay to Boistle, the plaintiff, a debt due by Gladstone to Boistle, on a judgment previously recovered against Gladstone by Keyser, and assigned to Boistle; and the question is whether, in the absence of any evidence of the participation of Boistle in the contract, or consideration money from him or act done, or prejudice sustained by him, he can maintain this action in his own name against Blymire on this contract. It is clear that the right of proceeding on the judgment against Blymire remained in Boistle as before, whether the judgment was a lien on the property or not. He might either proceed by execution or by action of the debt on the judgment. Gladstone thus remain-

1. *Crow v. Rogers*.

ing liable to Boistle, if Blymire failed to pay according to his undertaking, Gladstone had a right of action against him on his promise, and for his own indemnity. If then by this action Blymire is liable also to Boistle, he may be twice sued. Who should be preferred? or might not Blymire, in one event, be compelled to pay both? The equity of the case would be, and chancery would decree, that Blymire should pay but once, and that the money should go to Boistle on his releasing Gladstone. But in two common law suits against Blymire it might be difficult to effect this equity. The suits must, therefore, be by Gladstone against Blymire, and by Boistle against Gladstone, and thus Blymire would be released by one payment to Gladstone, and Gladstone exonerated by paying Boistle; unless one suit should be brought in the name of Gladstone for the use of Boistle against Blymire.

On these reasons and authorities, we are compelled to come to the conclusion that this action is not maintainable, and that there was error in the charge of the court on this point. The other errors are sustained.

Judgment reversed.

The principal case is a leading one in Pennsylvania, and the rule enunciated by Sergeant, J., in his opinion has been often quoted with approval: *De Bolle v. Pa. Ins. Co.*, 4 Whart. 74; *Hubbert v. Borden*, 6 Id. 94; *Commercial Bank v. Wood*, 7 Watts & S. 94; *Finney v. Finney*, 16 Pa. St. 383; *Keller v. Rhoads*, 39 Id. 519; *Campbell v. Lacock*, 40 Id. 451; *Robertson v. Reed*, 47 Id. 116; and *Goodrick v. Odenheimer*, 2 Phila. 65. See *Esling v. Zantlinger*, 13 Pa. St. 55.

KEPNER v. KEEFER.

[6 WATTS, 231.]

AT COMMON LAW, THE MAKING OF A CONTRACT or the giving of a bill on Sunday was not prohibited, and was therefore not void on that account. UNDER THE STATUTE OF APRIL 22, 1794 (Purd. Dig. 927), a note or bill executed on Sunday in Pennsylvania is void.

WHERE THE CONSIDERATION OF A NOTE executed on Sunday is a contract entered into on the day previous, the plaintiff, to be entitled to recover, must sue upon the contract and not upon the note.

A NOTE EXECUTED UPON SUNDAY is not *per se* any evidence that there was a contract made on the day previous, and without other evidence it is error to submit that fact to the determination of the jury.

DEBT upon a note dated February 28, 1832, for two hundred and fifty dollars, payable in three months. The facts appear from the opinion.

J. Fisher, for the plaintiff in error.

Benedict, contra.

By Court, KENNEDY, J. This is an action of debt founded upon a single bill, bearing date the twenty-eighth of February, 1832, given by the plaintiff in error to the defendant, for the payment of two hundred and fifty dollars in three months after the date thereof. The plaintiff in error, being the defendant below, pleaded payment with leave to give the special matter in evidence. The defense set up under this plea was, that the bill, though dated the twenty-eighth of the month, which was Saturday, was actually signed and delivered on the following day, being the Lord's day, commonly called Sunday; and having been thus executed on Sunday, was therefore void under our act of assembly, passed the twenty-second of April, 1794: *Purd. Dig.* 927, ed. of 1837.

This act, among other things, enacts, that "if any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity, only excepted, etc., and be convicted thereof, every such person, so offending, shall for every such offense, forfeit and pay four dollars," etc. The counsel for the plaintiff in error under this prohibition of the act, after the testimony was closed, requested the court to charge the jury, if they believed the bill was executed and given on Sunday, that it was void. They likewise further requested the court to instruct the jury, that there was no evidence given, from which they could fairly infer a contract made on Saturday between the parties that would entitle the plaintiff below to recover in this action. The court on the first point instructed the jury as requested; but the court in relation to the second matter, told the jury, that "if a bond given to secure a debt, be void from being executed on Sunday, if the contract was made on Saturday, an action will lie on that contract; such bond, though a nullity, is not in the way of the plaintiff. The contract before made, if otherwise legal, remains in force; so that the case resolves itself into a question of fact, to be determined by the jury. Was the contract made on Saturday or not? If it was so made, the debt contracted on Saturday, the plaintiff would be entitled to recover. If the contract, however, as well as the note, was made on Sunday, the plaintiff can not recover; yet though a contract made on Sunday is void, a party may by acts

and declarations on Sunday, furnish evidence of a contract having been made before."

To the charge of the court on this latter point, exception was taken by the counsel for the defendant below, and has been assigned here for error.

That the bill or note, which is made the foundation of the plaintiff's claim, as set forth in the statement or declaration, if executed on Sunday, is void under our act of assembly, can not now be doubted; though, according to the doctrine laid down in *Comyn v. Boyer*, Cro. Eliz. 485, it would not perhaps be so. For it is there said, that "although by the statute, there is a penalty inflicted upon the party that sells upon that day, yet it makes it not to be void." But it has long been established, and is now settled beyond all question, that "if any act is forbidden under a penalty, a contract to do it is void:" *Drury v. Defontaine*, 1 Taunt. 136; *Bartlett v. Viner*, Carth. 252; S. C., 5 Vin. Abr. 507; *Mitchell v. Smith*, 1 Binn. 118 [2 Am. Dec. 417]; S. C., 4 Dall. 268; 4 Yeates, 84.

At common law, the making of a contract, or the giving of a bill on Sunday, as is alleged was done in the present case, was not prohibited, and therefore would not have been void on that account. In *Macalley's case*, 9 Co. 66 b; S. C., Cro. Jac. 279, it was held, that an arrest might be made at common law in any case on Sunday. A distinction is there taken between judicial and ministerial acts; the latter might be performed on Sunday, but the former could not. This distinction is also mentioned in *Waite v. The Hundred of Stoke*, Cro. Jac. 496, where the legality of traveling on Sunday is recognized. And in *Rex v. Brotherton*, 1 Stra. 702, an indictment at common law for exercising the trade of a butcher in selling meat on Sunday, without concluding *contra formam statuti*, was held bad on demurrer; which could not have been, had not such employment on Sunday been lawful at common law. And this is in conformity to the case of *Comyn v. Boyer*, cited above, Cro. Eliz. 485, where it was adjudged that the holding of a fair for the sale of goods on Sunday, was good at common law. The several statutes also, passed upon this subject, prohibiting sales on Sunday, show that previously thereto, they were not unlawful or inhibited by the common law, otherwise the passage thereof would have been unnecessary. Accordingly, it was ruled in *Drury v. Defontaine*, 1 Taunt. 131, that the sale of a horse made on Sunday by the plaintiff, not made in the exercise of his ordinary calling, and therefore not falling within the

prohibition of 29 Car. II., c. 7, sec. 1, was lawful at common law. And again, in *Rex v. Inhabitants of Whitnash*, 7 Barn. & Cress. 596; S. C., 14 Eng. Com. L. 100-1, a contract made on Sunday between a farmer and a laborer, by which the farmer hired the latter for a year's service, was adjudged lawful and not void, because it did not come within the prohibition of the statute; which extends only to the "worldly labor, business, or work of a man's ordinary calling," and forbids the performance thereof on the Lord's day, under a penalty therein mentioned. The words of our act of assembly, however, are much more comprehensive than those of the statute of 29 Car. II., c. 7, sec. 1, and sufficient to embrace every species of worldly business, not therein specially excepted, whether it appertains to, or be in the exercise of a person's ordinary calling or not. By the terms of the act, it is clear that it is not restricted to the business of his ordinary calling, so that we think the court below was right in advising the jury that the execution of such a bill, as the one in question, on the Lord's day, came within the prohibition of the act, and was therefore void.

It has been thought proper to refer to the authorities showing what the common law was on this subject, in order to correct a mistake, into which the court of common pleas of Philadelphia county seems to have fallen, in *Morgan v. Richards*, 1 Browne, 171, where it says a contract made on Sunday was void by the common law.

In regard, however, to the matter assigned for error here, we think the court below were wrong, in leaving it to the jury as a question of fact, to be decided by them, whether the defendant below had not made or entered into a parol contract with the plaintiff on Saturday, the day preceding the giving of the bill, whereby he became indebted to the plaintiff in the sum of money mentioned therein, to secure the payment of which the bill was given. There appears to have been no evidence given on the trial of the cause, from which the jury could possibly draw the inference of such a contract having been made on Saturday, or on any other day, save Sunday, on which it would seem the bill was executed.

The giving of the bill certainly furnishes no evidence of it; it at most is only evidence of a contract concluded then, and not before, between the parties. The bill, in its terms, does not purport to have been given in pursuance of a contract entered into on the day before, or on any previous day; nor yet to be the consummation of such a contract. Neither can the circum-

stance of the bill's being dated as of the preceding day to its execution, be fairly construed into an admission by the party giving it, that a parol contract to pay a similar amount of money was agreed on between the parties on that day. But supposing it to be equivalent to such an admission, still it is difficult to perceive how it could have availed the plaintiff below, so as to entitle him to recover in this action. It is founded upon the bill in question, and not upon a special agreement, made merely by word of mouth, which possibly might have formed the consideration for giving the bill.

Having shown that the giving of the bill on Sunday, with a date to it of the preceding day, was not any evidence from which the jury could draw the conclusion, that a contract was made between the parties on the latter day, it remains to see whether any parol or other evidence was given, tending to prove the fact. It is not pretended that anything else was proved, having the least bearing in this way, except that the defendant below went with the plaintiff on Saturday to look at the looms, the purchase of which was proved to have been the consideration of the bill or note. But it would be going too far to say, that this was evidence of their having concluded an arrangement on that day. If they did, why was not the bill given then? The answer, which naturally if not necessarily presents itself, in the absence of all evidence to the contrary, is, that the parties did not then come to any final agreement on the subject; and therefore the bill was not then given. But on the next day, Sunday, the parties having met again, came to a conclusion, made their agreement as may reasonably be inferred, and in pursuance thereof the bill was given. But admitting the parties to have agreed on the terms of the purchase on Saturday, which is the utmost that there is any pretense for saying there was done, still, the right of the plaintiff below to recover from the defendant, might be considered perhaps as standing on a different footing from that of his right to recover on the bill, if it were good. The giving of the bill might, were it valid, be considered as equivalent to the payment of the price agreed to be given for the looms, and as vesting the property of the looms in the defendant below, without an actual delivery of them. But regarding the bill as void; and, as it would seem, there was to be no actual delivery of the looms by the plaintiff below to the defendant; but that they were to remain where they then stood for the defendant, who was to come and take possession of them at a subsequent day, the contract made

on Saturday might possibly therefore be considered only as an executory agreement for the sale of the looms, which, being unaccompanied by a delivery of the possession or payment of any part of the price, would not transfer the right of property; nor be considered sufficient, perhaps, to enable the vendor to maintain *indebitatus assumpsit* against the vendee, for the price agreed to be paid. The defendant in such case, never having taken possession of the looms, the plaintiff's only remedy, possibly, might be an action, founded on the special agreement, to recover such damages as the jury, under the circumstances, might think him justly entitled to.

Be this, however, as it may, it is very certain, that had the evidence given been such as to have justified the jury in finding that such a contract had been made on Saturday between the parties, it could not have entitled the plaintiff to recover in this action, which is brought on the bill alone, and not upon any such special agreement.

Judgment reversed, and a *venire de novo* awarded.

Cited, in *Berrill v. Smith*, 2 Miles, 403; *Fox v. Mensch*, 3 Watts & S. 446; and *Sparhawk v. Union P. R. R. Co.*, 54 Pa. St. 440, to show that contracts made on Sunday for worldly purposes or for pleasure are illegal under the statutes of Pennsylvania; and in *Johnston v. Commonwealth*, 22 Id. 109; *Commonwealth v. Jeandell*, 2 Grant, 508; and *Shuman v. Shuman*, 27 Pa. St. 94, the rule that if any act is forbidden under a penalty, a contract to do it is void, was reiterated upon the authority of the principal case.

SUNDAY, CONTRACTS MADE ON.—It was a principle of the common law, that Sunday was *dies non juridicus*. The validity of contracts entered into upon that day generally depends upon the statutes of the states where they are made. In the note to *Coleman v. Henderson*, 12 Am. Dec. 290, 295, the validity of contracts entered into, as well as judicial and other acts performed on that day, was considered at length. See also *Van Riper v. Van Riper*, 7 Id. 576; *Story v. Elliot*, 18 Id. 423 and note; *Amis v. Kyle*, 24 Id. 463; *Sayles v. Smith*, 27 Id. 117 and note.

WILLIAMS v. MAUS.

[6 WATTS, 278.]

A TRUSTEE APPOINTED BY THE COURT OF ANOTHER STATE in the place of a deceased trustee to whom land in Pennsylvania has been conveyed, obtains no title to the land so as to enable him to maintain ejectment for it.

EJECTMENT, brought to recover certain lands in Columbia county. James West, a citizen of Maryland, and a resident of Baltimore, conveyed to Pierce and McDonald certain lands, of which that in dispute was a part, for the purpose of selling it

and paying certain debts. Maus being in the adverse possession of the land, Pierce and McDonald brought this action to recover possession, and during its pendency they both died. Subsequently to their death, the county court of Baltimore, upon the application of West's creditors, appointed Williams, a resident of Baltimore, a trustee in place of Pierce and McDonald, and he was substituted in their stead as plaintiff in this action. On the trial, title to the land was shown to have been vested in West, and by him conveyed to Pierce and McDonald. An exemplification of the record of the proceedings in the Baltimore county court was offered in evidence, but upon objection of defendant, was excluded. This was the only matter assigned for error.

Donnel, for the plaintiff in error.

Frick, contra, cited Story Conf. L. 380, 416, 419, 450, 468.

By Court, KENNEDY, J. The evidence offered here, was objected to, on the ground that a court of the state of Maryland had no authority to entertain such a proceeding in regard to lands lying beyond her territorial limits, and therefore could make no order or decree, that would affect the title thereto, or transfer it from him in whom it then remained, to any other. And unless the decree of the Baltimore county court were to have this effect, it was perfectly obvious, that it did not tend to prove that Nathaniel Williams, who was then claiming to recover the land in question, had any title to it; and therefore ought to be considered irrelevant and inadmissible.

According to the maxim, *extra territorium jus dicenti impune non paretur*, it would certainly seem, that no sovereignty could claim to bind or change the right to real or any immovable estate lying without its territorial limits, and had therefore no reason to expect that such a decree, if made, would be regarded by the tribunals of the state *rei sitæ*. In short, it can not be treated otherwise than as a mere nullity by those tribunals, consistently with a proper respect for their own authority, and the obligation, which they owe to their own sovereignty to maintain all its rights unimpaired.

In England, where a court of chancery, when having jurisdiction over the person of a bankrupt, has gone a great length in coercing him to furnish the assignees under the commissioners with the means of possessing themselves of all his estate, yet it has refused to compel him to execute an assignment of debts due to him in America, though the American government

had refused to take any notice of the rights of the assignees under the bankrupt laws of England: *Ex parte Blakes*, 1 Cox, 398. Nor will he be compelled to convey to the assignees his real estate lying in Scotland: *Selkring v. Davis*, 2 Dow. 245. And as to the real estate of an English bankrupt, lying in another country, under the dominion of a foreign government, it was never supposed that even the English parliament, in the full exercise of all its omnipotency, could make a law that would transfer or divest him of his right thereto, contrary to the regulations of the country where it was situate. To suppose that such a thing could be done under any circumstances, would be in direct contradiction to the universally received axiom, that every state possessing an exclusive sovereignty and jurisdiction within its own territory, necessarily has the power of making laws, which, when passed, affect not only all the persons, but likewise all the property, whether real or personal, within its own territory; and hence it is, that these laws become the rule of decision for all questions which arise there: *Campbell v. Hall*, Cowp. 208. And in conformity to this principle, it is said by Lord Mansfield in *Robinson v. Bland*, 1 W. Bl. 259: "Landed property must be governed by the local laws; in consequence whereof, deeds and wills made in Paris, to convey lands in England, must be made and interpreted according to our laws." And agreeably thereto, it would seem to be regarded as a settled rule in the United States, that any title or interest in land or real estate, can only be acquired or lost in the way directed by the law of the place where the same is situate: Story Conf. L., 301, 302; *Cutler v. Davenport*, 1 Hick. 81, 86; *Hosford v. Nichols*, 1 Paige, 220; *Wills v. Cowper*, 2 Ham. 124.

Now, by the laws of Pennsylvania, the title to real estate can not be transferred or passed, not even by the owner of it, without a writing made by him to that effect, and signed either by himself or his agent, thereunto lawfully authorized by writing; unless it be in cases of sales made by the proper officers, under the authority of judicial process or execution, for the payment of the debts of the owners thereof, or by decrees or orders of some of the courts within the state for some special purposes, authorized by statute; or in cases of resident debtors of the state, who have assigned their estates to assignees or trustees, for the purpose of being converted into money to pay their debts, where the courts of common pleas of the respective counties in which such assignors resided, at the time of making their assignments, are authorized by statute to appoint new

trustees when one or more of the several assignees or trustees in any such case shall have removed, or refused to accept or execute the trust, or shall have died, or been dismissed, or discharged therefrom by the same courts. But in no case, whatever, is any court without the state authorized to supply the place of a trustee of real estate, lying within the state, who has ceased to exist, or become incapable of acting and executing the trust from that or any other cause. As well might the title to land lying within the limits of the state be transferred by a fine or common recovery, levied or suffered in a foreign court, or court of a sister state, and be transferred by the decree or order of the same court, made too against the party, whose interests may be affected by it, *in incertum*, and yet such a thing was never heard of. Indeed, it may be said, that the mode by fine or common recovery, would be the least exceptionable of the two, because the party entitled to the freehold interest of the estate in possession, is not only made a party to such proceeding, but must be consenting to the transfer of title thereby intended to be made. But in this case, as West was a resident of the state of Maryland, when he made the assignment to Pierce and McDonald, and having made it in that state to assignees, who were also resident therein, I think it more than questionable, whether any court, even within this state, could appoint a trustee, so as to invest him with the title to the land in question, which was transferred by West to Pierce and McDonald. I am inclined to think that our acts of assembly on this subject extend only to assignments made within the state, and perhaps only to such as are made by residents thereof. The title here transferred by West to Pierce and McDonald, upon the death of Pierce, became wholly vested in McDonald, by the right of survivorship, and upon his death, descended to his heir at law, where it would seem to remain now.

Judgment affirmed.

MOTT v. DANFORTH.

[6 WATTS, 304.]

WHERE TWO PERSONS CONSPIRE with a third to defraud the latter's creditors, and in pursuance thereof take an assignment of his property and aid him in leaving the state, they are liable in an action upon the case to such creditors.

THAT THE DEBT OF A CREDITOR IS NOT DUE at the time of the conspiracy is no objection to such action.

MEASURE OF DAMAGES in such an action is the value of the property withdrawn from the reach of the creditor, and not the amount of the debt due him.

ACTION ON the case, brought by Danforth against Ithamar Mott and Sylvania Mott for a conspiracy and fraud. The declaration alleged that George Tarbox was indebted to plaintiff in the sum of nine hundred and eighty-eight dollars and interest on a note dated May 8, 1833, payable in six months, and that the defendants, to defraud plaintiff of his debt, excited and procured Tarbox to leave the country without paying the debt, whereby it was lost. The second count averred that Tarbox was possessed of goods sufficient to pay the debt, and that the defendants, to defraud plaintiff and prevent its payment, conspired with him to secrete and eloin said goods, and that they did secrete and eloin them, and converted them to their own use. From the evidence it appeared that Tarbox was a traveling peddler, being the owner of a wagon and horses and certain valuable merchandise; and that in May, 1833, he purchased of plaintiff in Connecticut one thousand dollars' worth of goods on credit of six months, for which he gave his note. He also purchased of other persons in that state to a considerable amount. It appeared that Tarbox and defendants were very intimate, and that they colluded with him to enable him to defraud his Connecticut creditors, and that for that purpose they obtained from him in October, 1833, his wagon and horses and merchandise by a pretended sale, and assisted and accompanied him in absconding from the state, leaving his debts unpaid. The jury found for plaintiff.

Jessup and Conyngham, for the plaintiff in error.

Dimmock and Greenough, contra.

By Court, **SERGEANT, J.** The action on the case for a conspiracy, has in modern times taken the place of the writ of conspiracy, which seems to be considered as antiquated. The instances of these suits in our reports, are not very numerous, but sufficient appears to show that an action on the case lies wherever the plaintiff is aggrieved and damnified by unlawful acts, done by the defendants, in pursuance of a combination and conspiracy for that purpose. It is said by Tilghman, C. J., in *Griffith v. Ogle*, 1 Binn. 174, 175, that the conspiracy is the gist of the action, though it is still necessary to show some act done in execution of it. In that case it was held to lie against two defendants for conspiring falsely and maliciously, to accuse the plaintiff before the house of representatives, of

extorting illegal fees, and endeavoring to procure a person to make affidavit thereof, they knowing the contents to be false. In *Mitchell v. Morrison and Penrod*,¹ 8 Serg. & R. 522, and 2 Penn. 126, the plaintiff, Mitchell, had obtained judgment against Morrison, and the defendant Penrod had, previously to the judgment, obtained from Morrison his effects, consisting of certificates of turnpike stock, and then had Morrison imprisoned under an execution, on a judgment before a justice of the peace, until he was discharged under the insolvent laws. It was held, that the action on the case for the conspiracy, was maintainable; Rogers, J., says, although Mitchell could not collect his debt by *fieri facias* and levy, yet satisfaction might have been obtained, by compelling Morrison to assign for the benefit of his creditors; there was at least a chance of satisfaction, of which he ought not to be deprived by any fraudulent combination with his debtor. In *Smith v. Tonsal*, Carth. 3, 4, the following case was adjudged on demurrer in B. R., and affirmed in the house of lords. A. declared that he had obtained judgment against J. S., for one hundred pounds, and that one hundred pounds more were due to him for rent arrears; that he, intending to take out execution, and also, to bring an action of debt for the rent in arrear, the said J. S., being then possessed of goods and chattels sufficient to discharge the whole, which being very well known to B., the defendant, he, by covin conspiring with the said J. S. to defeat him of his execution, and of recovering the money for rent in arrear, procured the said J. S. to confess a judgment for one hundred and sixty pounds to one J. N., and that he sued out execution on this feigned judgment, by virtue whereof, he seized all the goods and chattels of the said J. S., which he eloigned to places unknown, and converted to his own use, by reason whereof the plaintiff lost his debt; the action well lies.

In *Meredith v. Benning*, 1 Hen. & M. 585, there is a report of an action, brought in the district court of Prince Edward county, in which the plaintiff had become surety for P. M., a deputy sheriff, and had been obliged to pay money for him, and he being about to sue and implead, and move against him for indemnification, the defendant, not ignorant of the premises, but craftily, etc., intending to defraud and injure the plaintiff, did secretly and maliciously, take and carry away the slaves, horses, cattle, household goods, and chattels, of the said P. M., to parts unknown, and did keep, secrete, and conceal them; and

1. *Penrod v. Mitchell*.

also, did then and there aid, assist, and counsel the said P. M., in removing himself to parts unknown, to the end, that the plaintiff might be prevented from recovering indemnification as aforesaid. The jury gave a verdict for the plaintiff, which the court, on motion for a new trial, confirmed; and the principle of the case seems to be approved by the judges of the supreme court of appeals in a subsequent chancery proceeding between the parties. In *Adams v. Paige*, 7 Pick. 542, it was held, that an action on the case for a conspiracy, would lie against two or more, for an unlawful act committed by them in concert, whereby the plaintiff suffered an injury, even although there was no corrupt design to cheat and defraud.

It would seem, that in most of the cases this remedy has been employed for acts in the nature of malicious prosecution, or abuse of legal proceedings; yet I perceive no reason why it should be confined to such cases. Conspiracy comprehends any confederacy to prejudice a third person, as where divers confederate to impoverish a third person: Hawk. P. C., b. 1, c. 72; or to defraud by agreement among themselves, to accept, indorse, and negotiate fictitious bills: 1 Leach Com. L. 232. It seems clear, that a combination to commit a misdemeanor, or other act, prohibited by law, constitutes this offense: 6 Petersdorff Abr. 99. By 13 Eliz., c. 5 (in force here), all fraudulent gifts, grants, etc., of lands, tenements, etc., goods, and chattels, to the purpose and intent, to delay, hinder, and defraud creditors, are declared, as against them, void and of no effect; and by section 3, the parties are subjected to a penalty. A conveyance is fraudulent within this statute, even though a valuable consideration passes, if made with intent to hinder and defraud creditors: Cowp. 434.¹ As where a person, knowing there was a decree in chancery and sequestration, bought the defendant's house and goods, and gave a full sum for them, yet being with a manifest intent to defraud the creditor, it was held fraudulent and void: Id. Nor is it necessary the plaintiff should have proceeded to judgment, or even brought suit, to bring the parties within the scope of the statute. Information on 13 Eliz., the plaintiff had brought debt against J. S., and attachment issued, and sheriff being ready to attach defendant by his goods, the defendant in disturbance of the execution of the process, showed a conveyance, by which he claimed them, and averred the fraud. It was objected not to be within the statute, because it goes not in delay of execution, no judgment being, but only in delay of

1. *Cadogan v. Kennett*.

process. The court held the contrary, by reason of the word delay, for appearance is delayed. And Periam and Rhodes conceived that avowing such conveyance, though no suit is pending, is within the statute; but Anderson doubted: *Pendleton v. Gunston*, Leon. 47.

The circumstance that the debt was not payable at the time of the alleged fraud, is not, in our opinion, a valid objection. Although it was not then payable, yet it was on the eve of becoming so, and the plaintiff might be as much defeated of his debt by acts done just before he was about to proceed to recover it, as afterwards. The plaintiff's claim is founded, not so much on his debt being due, as on the injury done to him by the defendant's sweeping away that property belonging to the debtor, which he might have made available by legal proceedings for recovery of his debt; and if this could be done just before the debt became due, the fraud might be committed with impunity. The question is one of fact for the jury, whether the acts were fraudulently done to defeat the plaintiff of his just debt, and whether he thereby lost the same. Nor is it necessary the designs of the defendants should be leveled at the plaintiff alone; if intended against him and others in the same situation, it is rather an aggravation than an alleviation of the offense.

As to the damages, the measure is stated in *Mitchell v. Penrod*,¹ 8 Serg. & R. 524, to be the value of the property withdrawn from the reach of the plaintiff by the assignments, and not the amount of the debt due to the plaintiff, and this appears to be the standard intended by the court below, in the present case, though the phraseology might have been more distinct. It is not easy to judge what was the property assigned by Tarbox to the plaintiffs and withdrawn, or its value; much was transacted secretly between the parties, and it was for the jury to judge how far it consisted of goods, notes, or money. The court, however, confine the plaintiff's claim to so much as was assigned and taken off by the parties, and the amount recovered was considerably below the plaintiff's debt.

Judgment affirmed.

Cited, in *Kelsey v. Murphy*, 26 Pa. St. 84, and *Hopkins v. Beebe*, Id. 87, to the effect that a creditor may sue parties at law who conspire to defeat his right of collection by fraudulently concealing and converting the debtor's goods, and that he must do this by a special action on the case.

1. *Penrod v. Mitchell*.

PATTERSON v. NICHOL.

[6 WATTS, 379.]

STATUTE OF LIMITATIONS IS NOT A BAR to the recovery of a distributive share of personal estate to which a person is entitled under the intestate law.

AN HEIR IS ENTITLED TO RECOVER INTEREST upon his distributive share of the estate of the deceased when upon demand for such share the administrator does not offer to pay it, although no refunding bond is tendered until long after the death of the intestate.

ACTION on the case by Thomas Nichol and Sarah, his wife, against John Patterson and William Patterson, administrators of Robert Patterson, to recover the distributive share of the plaintiff in the estate of her father. The points decided are sufficiently referred to in the opinion.

McCandless, for the plaintiff in error.

Livingston and Metcalf, contra.

By Court, KENNEDY, J. The first error assigned presents the question whether the statute of limitations is a bar to the recovery of a distributive share of the personal estate of an intestate, where six years from the time when the distributee might first have demanded the same from the administrators of the intestate have run before the institution of the action. The decision of the court, and the principles laid down in *Thompson v. McGaw*, 4 Watts, 161, and recognized again in *Doebler v. Snively*, 5 Id. 225, settle this question. There it was held that the statute of limitations does not embrace the case of a legacy. All the reasons there advanced, or which can be given, in order to show that the statute is not applicable to a legacy, are equally strong, at least to show that it can not be extended to the distributive share of an intestate's personal estate. Originally, in England, the courts of common law took no cognizance of the personal estates of intestates, remaining in the hands of administrators, after payment of the debts of the deceased, more than they did of those of testators which were disposed of by wills or testaments. Both were left under the direction of the ecclesiastical courts; since that, however, chancery has entertained jurisdiction of both, upon the ground of the executors being trustees for the legatees; and the administrators for the next of kin, who are entitled to the surplus of the intestate's estate, remaining after payment of the debts and funeral expenses, to be distributed and paid according to the statute of distribution.

And it would seem, if there be any distinction which can be drawn between a legacy and a distributive share under the intestate law, it would rather go to exclude more clearly the case of a distributive share from the operation of the statute of limitations, than that of a legacy; because, in the case of a legacy, there being no remedy provided or declared for the recovery thereof by statute, until the act of the twenty-first of March, 1772, and having no court of chancery in this state, the common law courts must, of necessity, have taken cognizance of legacies, and entertained actions for the recovery of them, in order to prevent an entire failure of justice, and an illegal withholding of another's right, without his having the means of redress within his reach. This act, therefore, may be considered rather of a declaratory character, and as having been passed with a view to regulate the practice of suing for legacies in such a way as to secure the interests of the creditors of the testator, by making it the duty of the legatees to enter into refunding bonds, with two sureties at least, before they should be entitled to demand and recover their legacies. But the orphans' courts would seem to have had an early jurisdiction given to them by our statutory intestate laws, which authorized them to settle and decree a distribution of the personal estate of deceased intestates, among the next of kin, according to the provisions thereof.

Anterior to the passage of the act of limitations, which was on the twenty-seventh of March, 1713, the orphans' courts of the state were invested with full power to call administrators to account for the personal estates of their intestates, and upon investigation and due consideration thereof, to decree a just and equal distribution of what remained in their hands, after payment of the debts and funeral expenses, to and among the next of kin, in the manner prescribed by the existing intestate laws. Now it is perfectly manifest that the limitation act contains no terms that can be made to embrace claims over which the orphans' courts had jurisdiction given to them, and that might have been recovered by application to them. Besides, the payment of the distributive shares coming to the next of kin of the intestates, was also secured by the bonds, which were required to be given by the administrators upon their taking out letters of administration. And it is equally clear, that all claims secured by bonds or specialties are not included within the statute of limitations. Again it has been held, that the statute does not apply or extend to cases of express trusts:

Walker v. Walker, 16 Serg. & R. 379; which from their very nature can not be subject to limitation, as long as the trust is undischarged; and while the relation of trustee and *cestui que trust* continues to exist, their respective rights and positions are not adverse to, but perfectly consistent with each other; so that the policy which dictated and gave birth to the statute of limitations, would not seem to require the application of such a principle, in order to put an end to the claim of the *cestui que trust*.

Neither can it make any difference whether the trust be created by the act or agreement of the parties, or by the act of the law, provided the trustee has expressly consented to take upon himself the character of a trustee, as in the case of administrators, for all come alike within the principle of the exception. In cases, however, of constructive trusts, resulting from partnerships, agencies, and the like, the statute has been held to apply: *Robinson v. Hook*, 4 Mason, 139, 150, 151, 152, 153, and the authorities cited in the margin; *Farnam v. Brooks*, 9 Pick. 243. And it may be, that the statute of limitations would protect a trustee in any case, against claims growing out of the trust, and not secured by deed or covenant under seal, where six years have run after the relationship of trustee and *cestui que trust* has been dissolved, and the latter has acquired a right to sue the former at law. But it is clear, that as long as the *cestui que trust* has no right to commence a suit, without first doing some act on his part, the statute can not run against his claim: in this respect, he must be considered as standing on the same footing with that of any other person. For instance, if a sum of money be made payable to the plaintiff within a limited time after request, he can not be said to have a right to sue, until he has made a demand, and the time appointed for the payment of the money thereafter has elapsed. And no rule of law seems to be better settled, than that the statute does not begin until the plaintiff's right of action has accrued, or he has acquired a right to sue: *Little v. Blunt*, 9 Pick. 490, 491.

And upon this ground it was ruled by this court in *Foster v. Jack*, 4 Watts, 334, that the statute of limitations did not commence running against the claim of an attorney at law for professional services, until after demand of payment made of his client, or the relation of attorney and client had been dissolved. Now in the present case the plaintiffs could maintain no action without making a previous request or demand of their claim from the administrators, and tendering to them a refunding bond, with sufficient surety. Had this been done, and the plaintiffs

afterwards had neglected to commence this action for six years, the statute possibly might have been a bar to it. But without a previous demand and tender of the bond, it would be unreasonable, and, indeed, unjust in the extreme, to permit the plaintiff to maintain such action as the present; because, if he recover at all from the administrator in such case, he is entitled to recover his costs from the administrator, which the latter must pay out of his own pocket. This was ruled in the case of *Wilson v. Wilson*, 3 Binn. 557.

By the intestate law, however, of 1794, the administrator is not bound, nor can he be compelled to pay until such bond shall be given; to say, then, that he may be sued for not paying before he is bound to do so, would certainly be somewhat anomalous; for until it be tendered to him, and he neglects or refuses to pay, it can with no propriety be said that he is in default. It would, therefore, seem to be contrary to every principle of analogy to hold that he may be sued, without such bond being previously tendered, and rendered liable to pay the costs of the action, as well as the plaintiff's share of the estate, upon the latter's tendering or giving the bond at any subsequent period or stage of the action. The act of assembly, in the case of a legacy, expressly requires that a demand shall be made and the bond tendered before the commencement of the action; and had the legislature when they required the like bond to be given by the next of kin in the case of an intestacy, intended it was preparatory to the commencement of an action upon the case, debt, detinue, or account render, as they had previously provided in the case of a legacy, they doubtless would have directed, in equally explicit terms, that a demand should be made first, and the refunding bond tendered to the administrator. But the refunding bonds, directed to be given in cases of intestacy, are only required to be given in the orphans' courts when distribution is made or decreed by them, which is done without commencing any action; or to be given to the administrators, where the parties shall agree to make distribution amicably without application to the orphans' court. It is very obvious, from the intestate law of 1794, that the legislature, in giving the orphans' court power to decree distribution, considered that they were thereby giving to the next of kin an ample and adequate remedy in every case of the kind that could arise; and that there would be no occasion to resort to an action like the present in a court governed by the rules of the common law in its course of proceeding: otherwise it is probable that they might have provided especially for it, as in the case of legacies; for the avowed ob-

ject of requiring a refunding bond to be given in both cases was, that creditors of the estate of either might be made secure in receiving payment of their claims, which was not to be dispensed with in any case. See the fifteenth and sixteenth sections of the act of the nineteenth of April, 1794, and the fourth section of the act of the twenty-first of March, 1772. If, however, those entitled to receive the distributive shares of an intestate's estate do not choose to abide by the remedy provided by the intestate act of 1794, and in pursuance thereof apply to the orphans' court of the proper county, in order to obtain payment, but will resort to an action like the present, such as is provided in case of a legacy, there is no reason why they should not be bound to make a demand and give bonds previously to commencing their actions, as the object and reason for doing so is the same in their case as in the case of legatees.

There is nothing in the second error which requires notice; that it can not be sustained is too plain to admit of argument. Neither do we perceive any error in the third matter excepted to. It was right to allow the interest, seeing the defendant did not even attempt to show that he or his colleague, for whom he had made himself accountable by joining with him in settling their administration account, had not used the money sued for: but the very circumstance of their not paying or offering to pay the money, upon its being demanded in due form, was evidence to prove that they had actually used it, or otherwise they would have offered to pay the principal at least. In justice, therefore, they are bound to pay the interest as well as the principal.

As to the fourth and last error, there does not appear to have been any evidence given to the jury on the trial, showing that John Patterson, the other administrator, was the guardian of the plaintiff's wife at any time, and that as such he had any charge of either her person or estate; nor was any evidence given going to prove that he had maintained or supported her out of his own estate, or that he had expended the money in question for that purpose; no account of the kind was produced. All the instruction, therefore, asked of the court to the jury, by the counsel for the defendant below, in relation thereto, was without the necessary ground to warrant or render it proper.

Judgment affirmed.

Cited and followed with approval, upon the rule adopted as to the statute of limitations, in *Commonwealth v. Molitz*, 10 Pa. St. 529; *De Haven v. Bartholomew*, 57 Id. 129; and *Burd v. McGregor*, 2 Grant Cas. 365. Also in *Logan v. Richardson*, 1 Pa. St. 373, upon the point that the omission to tender a refunding bond can not be pleaded in bar to an action for a distributive share of an intestate's estate.

TARBOX v. HAYS.

[6 WARR, 398.]

JUDGMENT OF A JUSTICE OF THE PEACE can not be impeached in a collateral action by showing by parol evidence that the defendant was not served with process and that the court never acquired jurisdiction of his person.

JUDGMENT OF A JUSTICE OF THE PEACE can not be impeached in an action of replevin to recover goods sold by authority of an execution issued on the judgment, although the plaintiff in execution was the purchaser of the goods and the defendant in the action of replevin.

REPLEVIN brought by Edmund Adams and Elias Hays against Asa P. Tarbox and David Gress, to recover certain boards and shingles. Verdict for plaintiffs. The facts are stated in the opinion.

Pearson and Struthers, for the plaintiffs in error.

Galbraith, contra.

By Court, SERGEANT, J. This is an action of replevin for a quantity of boards and shingles, in which the plaintiffs showed that they were the original owners of the property. The defendants claimed under a sale of the property by the constable, on an execution issued by a magistrate upon a judgment recovered before him, in July, 1831, by the defendant Tarbox, against the plaintiffs, Adams and Hays. The plaintiffs, in reply, allege that the judgment was obtained without service of process or notice, and, therefore, the proceedings must be deemed a nullity, and no title passed by the constable's sale.

To substantiate their allegation, the plaintiffs called the constable and other witnesses, who proved that Tarbox brought the summons to the constable's house, and directed him to serve it by leaving it at his (Tarbox's) house, where Hays had been boarding, but was gone, about a week previous, to New York, where he resided, and whence he returned, in October following. That Adams lived in McKean county, to which he had moved, in April, 1830. The summons was indorsed by the constable, Messenger, "Copy of summons left at the house where one of the defendants, Hays, has been boarding a short time ago." The magistrate then entered on his docket, "Summoned by Messenger, served on oath by copy," and rendered judgment.

This evidence does not support the plaintiffs' allegation; for whatever might be our opinion if the case stood simply on the return of the constable, and the parol evidence, yet to aver that there was not service on the defendants, is to contradict the

record of the magistrate, and thus by matter *dehors* to destroy the truth and validity of the proceedings of a judicial officer in a matter in which the acts of assembly give him jurisdiction. Whether there was legal service or not, was a matter he was directly required to examine and adjudicate upon, before proceeding in the suit. His record shows that he has decided that there was a copy duly served; and that decision and the judgment rendered thereon, must be deemed conclusive in a subsequent collateral proceeding between the same parties. In *Field v. Gibbs*, 1 Pet. 155, to an action of debt in the circuit court of New Jersey, on a judgment obtained against the defendant, in the common pleas of Philadelphia, one of the defendants pleaded, that no process had been served upon him, and that he never appeared to the suit, to which the plaintiff demurred, and it appearing, by the record, that there had been a general appearance by attorney, and pleas entered by both, it was held that the plea was bad. So, here, by the entry of the magistrate on his record, it appears that the process was served, and it is not competent to the defendants, collaterally, and in a subsequent proceeding, to travel into parol evidence, to contradict the averment of the record, and to show that in reality the process was never served.

But even if the proceeding and judgment before the magistrate were irregular and voidable, so that the judgment might have been reversed on error or *certiorari*, or vacated on motion, it by no means follows, that the title to goods previously sold, under the execution, would be thereby divested. The general rule has long been established, that the sale by the sheriff of the goods or chattels of the defendant, taken on a *fiery facias*, conveys an indefeasible title to the vendee; so, that if the writ be altogether irregular and unauthorized, and afterwards vacated, the defendant shall not be restored to his goods. His remedy is to have restitution of the money levied, but not of the goods themselves: 5 Rep. 90; Dyer, 363; 1 Mau. & Sel. 425;¹ Wats., Sheriff, 188, 214; Bro. Abr., Trespass, pl. 238, cites 22 Ass. 64; 20 Vin. Abr. 493; *Jeans v. Wilkins*, 1 Ves. 195; *Small v. Woods*, 1 Ld. Raym. 252;² *Marshalsea case*, 10 Rep. 76; *Martin v. Rex*, 6 Serg. & R. 296; *Lewis v. Smith*, 2 Id. 156; 8 Rep. 126. So necessary is this rule to the encouragement and security of purchasers, and to the protection of the interests of defendants themselves, that our early acts of assembly, when they declared lands to be chattels, for payment of debts, and

1. *Doe v. Thorn*.2. *Error*.

subjected them to sale on execution, applied the same principle to them. And there is no difference whether the purchaser be the plaintiff or a third person; they stand in the same situation where, as with us, sales on execution are made by public vendue: 1 Rawle, 223;¹ 2 Watts, 147.²

The only exception to the general rule above stated is, when the court, from which the writ issued, had no jurisdiction, or the goods are the goods of a stranger: 6 Binn. 2;³ 5 Barn. & Ald. 826;⁴ Wats., Sheriff, 188. In these cases the authority of the court or officer is a usurped one, and their acts are to be considered as the acts of strangers, and as utterly null and void. Here the goods were not the goods of a stranger; nor is there any ground for saying that the magistrate had no jurisdiction. The acts of assembly gave him jurisdiction over the demand. When a magistrate, or a party, or a constable, is guilty of misconduct, he is responsible for his own acts in a personal action against him. Trespass lies after the judgment has been vacated, though not before: 1 Ld. Raym. 309;⁵ 1 Lev. 195. Case would lie for fraud and practice to the injury of a party. A certiorari would lie to reverse the proceedings even, perhaps, after the twenty days, if it appeared that the defendant had no notice within that time: 1 Ashm. 135.⁶ Or the magistrate may open the judgment: Id. 149.⁷ But, however defective, illegal, or irregular the judgment may be, yet if rendered by a court having jurisdiction, and a sale takes place by execution thereon, the title passes. And here the defendants, without reversing the judgment, can not be put in a better situation than they would have been if they had reversed it.

It is alleged that the plaintiff was guilty of fraud, in obtaining the judgment, and, therefore, it is inferred, that it is an absolute nullity. The evidence by no means shows satisfactorily, that an imposition was practiced on the magistrate. The constable's return stated what the parol proof makes out, as to Hays, and there was no return at all as to Adams. It is no more than attributing to the magistrate, that common care and prudence which the law presumes in all judicial proceedings, if we infer, that he had evidence to satisfy him of the fact, before he adjudicated that the summons was served. What that evidence was, we know not, nor is the magistrate now a party. If the judgment was even illegally obtained, the defendants were bound to take advantage of it by a regular course of pro-

1. *Arnold v. Gorr.*

2. *Hale v. Henrie*; 8. C., 27 Am. Dec. 289.

3. *Shearick v. Huber.*

4. *Farrant v. Thompson.*

5. *Button v. Cole.*

6. *Dailey v. Bartholomew.*

7. *Galley v. Davenport.*

ceeding, and can not question the proceeding collaterally. Every irregular and illegal proceeding may, in a certain sense, be said to be *in fraudem legis*; but it is not that which one party to a former suit can aver in a subsequent collateral proceeding, in order to destroy a record of a judgment. If this could be done, every irregularity in a party, constable, or magistrate, would be termed fraud, and the judgments and proceedings overhauled and re-examined, and averred to be void and of no effect. The consequences would be serious indeed, and the doctrine is opposed to every principle of the law: 1 Pick. 438;¹ 6 Id. 247;² 12 Johns. 434;³ 5 Wend. 161;⁴ 6 Id. 447.⁵ It is only third persons, who, not having any mode of reversing or setting aside a judgment, by writ of error or otherwise, may aver, that it was obtained or kept on foot by collusion between the parties, to their injury, and in such case the judgment is binding between the parties, though as to others of no effect: *Fermor's case*, 3 Rep. 77.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Robinson v. Zollinger*, 9 Watts, 170, to the effect, that the judgment of a court of competent jurisdiction can not be avoided in a collateral proceeding, though the party affected were neither summoned nor heard. Also, in *Kean v. McKinsey*, 2 Pa. St. 31, and *Lauman's appeal*, 8 Id. 477, that a judgment, though irregular on its face, and even illegally recovered, can not be impeached in a collateral proceeding. Also, in *Thompson v. Hanlen*, 6 Watts, 493, that a judgment rendered by a magistrate having no jurisdiction over the subject-matter is a nullity.

JUDGMENT, ATTACK ON, FOR WANT OF JURISDICTION.—In the case of *Dufour v. Camfranc*, 13 Am. Dec. 360, it was claimed by the plaintiff that a judgment was null and void, because the defendant in the judgment had not been served. To this claim the court replied: "We are of opinion that the validity of a sentence rendered by a court of competent jurisdiction can not be inquired into collaterally, as is attempted here." In the note to that case, at page 365, it is stated that if the court intended to assert that a judgment can not be avoided by showing that jurisdiction had never been acquired over the person of the defendant, it placed itself upon very debatable ground, and a number of late authorities were cited showing that parol testimony might be admitted, even in a collateral proceeding, to show that a judgment was void because the defendant was never served. See, also, *Freeman on Judgments*, 3d ed., sec. 133.

1. *Homer v. Fisk*; S. O., 11 Am. Dec. 218.

2. *Hall v. Williams*; S. O., 18 Am. Dec. 356.

5. *Shanway v. Stillman*.

3. *Richards v. Walton*.

4. *Holbrook v. Murray*.

STEWART v. KEARNEY.

[6 WATTS, 453.]

TROVER WILL NOT LIE TO RECOVER the possession of personal property which the plaintiff has parted with for the purpose of defrauding his creditors.

PERSONAL REPRESENTATIVES of such a person may, after his death, maintain such an action for the benefit of his creditors if his estate be otherwise insufficient to pay his debts.

TROVER, brought by Kearney against Stewart and Shough, for a wagon and team. During the pendency of the action Kearney died, and his administrator, R. P. Flenniken, was substituted. It appeared that Kearney had delivered his team to Shough, who gave his note for the price, but evidence was offered to show that the sale was not *bona fide* and that Shough was to drive the team to Maryland and there redeliver it to Kearney. Stewart bought the team of Shough, but, as was alleged, with knowledge of the contract between Kearney and Shough, and as privy to the whole transaction. Among other instructions the defendants asked the court to instruct the jury: "That if the sale and transfer of the team in dispute were made by Kearney to Shough in order to defraud his creditors and slip the property into another state, out of their reach, he can not now take advantage of his own fraud, but is bound by it, inasmuch as it was sold by Shough to Stewart, a third person, who has paid his money for it." The court gave this instruction in substance to the word "fraud," and then added: "But must be bound by it if the property has been sold by Shough to Stewart, and he has paid his money therefor without notice of the secret and unfair purpose." The instruction, as modified, defendants assigned as error.

Ewing, for the plaintiffs in error.

Austin, for defendant in error.

By Court, GIBSON, C. J. That a collusive contract binds the parties to it, is a principle which commends itself no less to the moralist than to the jurist; for no dictate of duty calls on a judge to extricate a rogue from his own toils. On any other principle a knave might gain, but could not lose, by a dishonest expedient; and we should but administer provocatives to unfair dealings, did we repair the cross accident of an unsuccessful trick. It is, therefore, in accordance with a wise and liberal policy, which requires the consequences of a fraudulent

experiment to be made as disastrous as possible, that a fraudulent bargainee is assisted—assisted for no merit of his own, but for the demerit of his confederate. For a principle, so plainly established as that which has grown out of this policy, I recur to no authority. It is a rudimental one, which meets the eye at every turn of professional research; and we have applied it, though the representation were not in the shape of a warranty, wherever there was collusion to be discouraged. In *Cook v. Grant*, 16 Serg. & R. 198 [16 Am. Dec. 564], the pretended rescission of a sale was held to preclude a party to it from setting it up against his fellow; and in *Bell v. Loughridge* (there misprinted Longbridge), the late chief justice prevented a creditor from insisting on the lien of his judgment, because he had given the debtor a feigned acquittance to save his land from condemnation by an inquest. In what respect is the principle of those cases inapplicable to this? The effect of a sham sale on the title was put as a point for direction; and the judge, premising that a party can not have the aid of the court to enforce a sale intended to have been a fraud on creditors, directed that it would bind the right, if the property were transferred to a second vendee, ignorant of the fraudulent purpose; thus directly affirming that the law will not execute a collusive contract betwixt the parties to it, and leaving the jury to infer that, in the absence of intervening rights fairly acquired, it will unravel an executed contract to set the parties back to the point from which they started. Far otherwise. It not only sustains the contract when executed, but enforces it when executory; and the rule, as well as the exception, was misstated.

In *Montefiori v. Montefiori*, 1 W. Bl. 364, the action was on a promissory note, drawn without consideration, to give the payee a false credit in a marriage treaty; and Lord Mansfield shortly disposed of the defense, saying that betwixt confederates “it shall be as represented to be; for no man shall set up his inequity as a defense, any more than as a cause of action.” Then, whether the second vendee be a *bona fide* purchaser or not, he may insist on the sale against the original vendor, because his predecessor could have insisted on it. For the benefit of the fraudulent vendor, or those who stand in his place, by testament or descent, no action lies; but against the interests attempted to be defrauded, the sale is a nullity, and this action is maintainable in the name of the administrator, as a trustee for the creditors, according to *Buehler v. Glonninger*, 2 Watts, 226, only so far as the property in contest may be needed for

payment of debts, whose existence the plaintiff would be bound to show. For aught that appears in our paper books, the state of the assets was not a subject of inquiry, but as the cause is ordered to another jury, it may become a very material one; for if the estate shall turn out to be solvent, the action will not be maintainable at all.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Blystone v. Blystone*, 51 Pa. St. 375, upon the point that a party who enters into a scheme to defraud others, and parts with his property for that purpose, can not recover it back. Also in *The Estate of Dyott*, 2 Watts & S. 567; *Pringle v. Pringle*, 59 Pa. St. 286; and *Bouslough v. Bouslough*, 68 Id. 499, the principal case was relied upon to sustain the rule, that the personal representatives of a party, or a trustee for the benefit of creditors, may set aside a fraudulent transfer or assignment of property, when it is necessary for the protection of the creditors, and the estate is otherwise insolvent: See *Bank v. Fordyce*, 9 Id. 278.

FRAUDULENT CONVEYANCES AND TRANSFERS.—It is well settled that a conveyance or other executed contract made for the purpose of defrauding or delaying creditors is binding upon the debtor and his heirs, and can not be avoided or set aside by them: *Osborne v. Moss*, 5 Am. Dec. 252 and note; *Jackson v. Marshall*, 3 Id. 695; *Reichart v. Castator*, 6 Id. 402; *Peaslee v. Barney*, Id. 743; *Terrel's Heirs v. Cropper*, 13 Id. 309; *Jenkins v. Clement*, 14 Id. 703, note; *Sickman v. Sapsley*, 15 Id. 596, 599, note. The executor or administrator of such debtor, however, not only has the right, but it is his duty to collect all the assets applicable to the payment of the debts of the deceased, including those which have been fraudulently transferred by the intestate or testator in his life-time. In this respect his powers are as ample as those of the defrauded creditors: *Ewing v. Handley*, 14 Id. 157, note; but see *Martin v. Martin*, 18 Id. 675.

TROVILLO v. TILFORD.

[6 WATTS, 468.]

COURT HAS NO RIGHT TO INSTRUCT THE JURY that the testimony proves a certain fact, although it may greatly preponderate in favor of that fact. LEVY TO BE VALID must generally be accompanied with an actual seizure, but the defendant may dispense with it for his own accommodation, and as between him and the officer, it is valid.

WHEN GOODS ARE LEVIED UPON, and by agreement left in the possession of the defendant, the latter becomes the agent of the officer, and upon his refusing to redeliver them according to his agreement, trespass *vi et armis* may be maintained against him and any one who aids him in retaining or removing them.

TRESPASS *vi et armis et de bonis*, etc., by Elijah Trovillo, sheriff, against Samuel Tilford and A. M. Tilford. Plaintiff having in his hands a *fi. fa.* against Samuel Tilford, in favor of W. P.

and T. M. Bryan, went to Samuel and told him he was directed to levy on his personal property, when Samuel replied, that the property belonged to his son. Thereupon they went to plaintiff's attorney, and it was agreed that Samuel should give the sheriff a schedule of the goods as a levy, and they should remain in the former's possession until the son returned. No actual seizure was made, but the schedule was furnished as agreed. Upon the return of the son he claimed the property as his own, and refused to allow the sheriff to take it. The evidence, which appears sufficiently from the opinion, preponderated in favor of the son's ownership. During the trial, upon the defendant's request, the court instructed the jury to render a verdict in favor of Samuel Tilford, no trespass having been proved, and the jury found accordingly. The court also instructed the jury, "that there was no legal evidence that the claim of the defendant (A. M. Tilford) to the property in question was fraudulent, and therefore the verdict must be in his favor." Also that "there was no evidence of a levy." Plaintiff excepted to these instructions.

McCandless, for the plaintiff in error.

Lowrie, contra.

By Court, ROGERS, J. Although the testimony may greatly preponderate in favor of the position assumed by the defendant's counsel, that A. M. Tilford, the son, was the owner of the goods on which the levy was made, yet we think the court were wrong in ruling, as a matter of law, that there was no legal evidence that the defendant's claim to the property in question was fraudulent. The allegation by the plaintiff, was, that the goods were the property of Samuel Tilford, the father, and that the transfer to the son was colorable, and made with a design to cover it from the claim of creditors. That it was at one time his property, is admitted, and at the time of the levy it was apparently in his possession. Samuel Tilford, the father, was the head of the family, and the goods were used for the purposes of the family, and certainly, the fact that the son, who was unmarried, and living with his father at the time of the levy, held a bill of sale for the property, required explanation, which it is at least possible, the jury, had the fact been submitted to them, may have decided was not given. It is not my intention to give any opinion unfavorable to the entire integrity of the defendants, but so many cases are constantly occurring, of attempts to cover property of debtors by means of

fictitious sales, that such cases should be narrowly watched and carefully examined. The credibility of the witnesses was a matter for the jury, and although the testimony of Brown is direct and positive, yet it would have been more satisfactory had he disclosed the source from which he derived his information. It would, also, have added to the strength of the plaintiff's case, if they had thought proper to examine Mr. Shirly, who was the trustee under the assignment. From the testimony of Brown, we can not avoid suspecting, that he acted as the agent of Shirly, rather than Mrs. Clopper, with whom, it would seem, he had no communication, and that his knowledge was obtained from that source. Under the circumstances, we think the court invaded the province of the jury, in withdrawing the facts from their decision.

But, were the court right in ruling, that there was no evidence of a levy? This point can only arise on the supposition, that Samuel Tilford, against whom the execution was issued, was the owner of the property on which the levy was made. The officer, in making the levy on the goods of the defendant, should make an actual seizure, but seizing part of the goods in the name of the whole, on the premises, is a good seizure of the whole. But, although an actual seizure is in general necessary to constitute a good levy, yet a defendant may dispense with it for his own benefit and accommodation. Thus in *Lyman v. Lyman*, 11 Mass. 317, it was held, that where certain friends of a debtor, against whom a deputy sheriff had a writ of attachment, gave to the deputy a receipt and promise in writing, to deliver him on demand, certain goods of the debtor, of which the deputy returned an attachment, it was held not to be competent for the receiptors, in defense of an action by the deputy upon their receipt, to except, that no attachment of the goods had been actually made. The objection was, that the goods returned as attached, were not actually seized by the officer, although he was in the house of the debtor, where the goods were kept at the time. But the court held, that although an actual possession of goods attached, may be necessary to prevent the operation of a second attachment, yet if the officer, for the accommodation of the debtor, at the instance of his friends, relieves him from the inconvenience of having his goods removed, the debtor can have no ground of complaint, and the receiptors are precluded, by their own act, from calling in question the validity of the attachment. In the present instance, an actual seizure was dispensed with, at the request and

for the accommodation of the defendant in the execution. The sheriff gave his deputy the writ, and told him to execute it, but instead of going to the dwelling-house, he went to the store, where he knew the defendant was, and told him of his instructions. After some conversation, he consented to go with the deputy to the house, and on the way, he said he would rather see his attorney first. Mr. Lowry was not at home, and the defendant said he did not know what to do, as his son and attorney were both absent. This was represented to the plaintiff's attorneys, who told him, if he would give a levy, it might remain so until his son's return. The defendant then gave a written list, a memorandum of the goods, which paper was attached to the writ as a levy, with the indorsement, "A levy made, stayed by plaintiff's attorney." To permit Samuel Tilford now, to object to the regularity of the levy, would be contrary to his own agreement, and manifestly unjust. It must be borne in mind, that the contest is between the original parties to the transaction. It can not alter the case, that, at the time of the levy, Samuel Tilford represented, that the goods belonged to his son, provided the jury should believe that those representations were not true in fact.

The court further instructed the jury that there was no legal evidence that a trespass was committed.

It was in proof, that after the return of A. M. Tilford, to whom it was alleged the goods belonged, the plaintiff's attorneys told the deputy sheriff to go and get the property. He called at the store, saw both father and son, and told them he had instructions to get the property he had levied on. The father alleged it was the property of the son, and that he had no authority to give the levy. The son said he would neither pay the money nor give the property; that he would defend it with his life; and that his attorney had so instructed him. The deputy sheriff again demanded the property, and was told the house was fastened, and that he could not get in. The sheriff's officer went twice to the house and found the front of the house closed. On this evidence the court gave the instructions of which the plaintiff complains.

From the time of a seizure, the officer should, either by himself or by some other person, keep possession of the goods, or otherwise they may be liable on a second execution. In England, it is usual to put some person in possession of the goods, and this is sometimes done here, to avoid the necessity of an actual removal. But it frequently happens, that goods, particularly

household furniture levied on an execution, from motives of humanity are left in the possession of the debtor himself, in the full confidence that they will be forthcoming to answer the exigency of the writ. And this, it appears, was the case here. The goods were left, under this arrangement, in the temporary possession of the defendant, with an understanding, that they would be given into the actual custody of the sheriff, on the return of the son. And this constitutes the defendant the bailiff, or servant of the sheriff.

Thus in *Ludden v. Leavitt*, 9 Mass. 104 [9 Am. Dec. 45], it is held, that where a sheriff having attached personal chattels on an original writ, delivers them to a third person for safe keeping, such person is the mere servant of the sheriff, and has no legal interest in the chattels, and that he can not maintain trover for them. The same principle is affirmed in *Warren v. Leland*, 9 Id. 265. These were cases of goods delivered to a third person, but that can not alter the principle, for as between the defendant and the sheriff, the same relation must exist, and the owner becomes, *quoad hoc*, his bailiff or servant. And in this point of view, trespass well lies. Thus in *Glasse v. Hayman*, 1 Leon. 87, it was ruled that trespass *vi et armis* lies against a servant for carrying away his master's goods. The case was this: Joan Glasse brought an action of trespass *vi et armis* against John Hayman, who pleaded the general issue, and the jury found this special verdict: that the plaintiff was a grocer in Ipswich, and there held a shop of groceries, and *quoad illa reposuit fiduciam* in the defendant, to sell the grocery wares of the plaintiff in the said shop; and further found that the defendant being in the said shop in the form aforesaid, *cepit et asportavit* the said wares and did convert them, etc. It was moved in arrest of judgment, that this action *vi et armis*, upon this matter did not lie, but rather an action upon the case. But the court was clearly of opinion, that the action doth well lie: for when the defendant was in the shop aforesaid, the goods and wares did remain in the custody and possession of the plaintiff himself: and the defendant hath not any interest, possession, or other thing in them, and therefore, if he intermeddle with them in any other manner than by uttering of them by sale, according to the authority to him committed, he is a trespasser, for he hath not any authority to carry the wares out of the shop not sold, but all authority is in the shop. And Rodes put the case of Littleton, 25. If I deliver my sheep to another to manure my land, and afterwards he kills them, I

shall have an action of trespass against him. And afterwards judgment was given for the plaintiff. And see 20 Vin. 55; Golds. 72 pl. 18; *Blosse's Case*.

The goods, after the levy, were left in the custody of the defendant for a limited time, and for a special purpose. This trust he has violated, by denying (contrary to the truth, if the jury should so find) his right to the property, and asserting the right of another, for the fraudulent purpose of defeating the plaintiff's action, and avoiding his own agreement. This makes him a trespasser, for it can not be doubted, that if a servant, who has the mere custody of his master's goods, as a butler who has the care of his master's plate, delivers them to another, on any pretense whatever, he is a trespasser, and that either trespass or trover may be brought against him. In trespass *vi et armis* no actual force is necessary to be proved. He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them, as having the property either general or special, does it at his peril to answer me the value in trespass or trover: *Gibbs v. Chase*, 10 Mass. 125. And upon the same ground, A. M. Tilford is also a trespasser, if the jury should find, that this was a juggle between the father and son, to avoid the effect of the levy, and to withdraw the goods from the lien of the execution. If a third person receive from a servant the goods of the master, knowing them to be so, and refuses to restore them, trespass will lie. And there is a distinction between a bailiff or servant, and a bailee of a chattel, coupled with an interest, who may maintain an action, even as against the bailor, who is the general owner: 1 Chit. 170. The delivery of a chattel by a servant can vest no interest, and all persons who direct, or assist, aid, or encourage another in committing a trespass, are in general liable as principals, though not even benefited by the act: 2 Saund. 47; Bull. N. P. 41.

It will be perceived, that the case depends entirely on the point, to whom of right the goods belong. If to the father, the action well lies, and if they are the property of the son, the verdict must be for the defendants.

Judgment reversed, and a *venire de novo* awarded.

Cited, in *Lowry v. Coulter*, 9 Pa. St. 352, and *Dorrance's Adm'r v. Commonwealth*, 13 Id. 164, upon the point that although an actual seizure is generally necessary to constitute a levy, yet that such seizure may be dispensed with by the defendant for his accommodation. Also, in *Becker v. Smith*, 59 Id. 473, that a possession of property by a person as servant or custodian will not prevent the owner from maintaining trespass *vi et armis*. In *McHugh v. Malony*, 4

Phila. 60, it was held, upon the authority of the principal case, that to render a levy valid as against a subsequent levy, the goods must be seized and possession thereof retained. In *Lewis v. Carsaw*, 15 Pa. St. 35, the principal case is cited and distinguished from that case.

LEVY, HOW MADE ON PERSONALTY.—To constitute such a levy the officer should enter upon the premises where the goods are, and take actual possession of them, if it can be done. The goods should be brought within his view and subjected to his control, and he should assert his title thereto by virtue of the writ, and his acts, it seems, should be of such a character as would subject him to an action of trespass, were it not for the execution: *Beelman v. Lansing*, 20 Am. Dec. 707, 711, note; *Commonwealth v. Stremback*, 24 Id. 351; *Westervelt v. Pinckney*, 28 Id. 516.

LYNCH v. COMMONWEALTH.

[6 WATTS, 495.]

SHERIFF PURSUES THE EXIGENCY OF HIS WRIT of *fi. fa.* or *vend. ex.*, by selling at public sale, and if he is guilty of no fraud or neglect in relation to such, he is not answerable to the plaintiff, although the property sold may have brought an inadequate price.

A GROSSLY INADEQUATE PRICE may be evidence of fraud or neglect in relation to such sale, but it does not, *per se*, give the plaintiff a right of action.

DEBT on the official bond of D. P. Lynch, as former sheriff of Fayette county. Springer's executors obtained a judgment against N. Mitchell, and levied on certain personal property of Mitchell which had already been levied upon under a *fi. fa.* issued in favor of William Barton. A *vend. ex.* was issued by the latter and the goods sold. It was claimed in this action that the property was sold greatly below its value, and much evidence was taken on that point. The sale was conducted in the usual way, in the presence of many citizens and of the attorney of Barton. The defendant requested the court to instruct the jury, "that when the sale is fair and in the presence of the attorney of the plaintiff, in the execution under which the sale is made, no stranger to the execution, whether a judgment creditor or not, can have any claim against the sheriff and his sureties by reason of any inadequacy of price;" but the court charged the jury that: "Generally speaking, mere inadequacy of price will not render the sheriff liable if he make a sale. There may, however, be so great a disproportion between the sum bid for an article and its real value that he ought not to strike it down, and if he does so, he ought to be liable, either to the defendant in the execution or to any one who may be interested in the property. This may be, too, even when the plaintiff is present and directing the sale. The sheriff is in some respects the agent

of the plaintiff: but he is also the officer of the law, and can not be required or allowed to sacrifice the property of the debtor; as, for instance, by selling an article worth one hundred dollars, for one dollar." The latter part of this instruction was excepted to by defendant. Verdict for plaintiffs.

Ewing, for the plaintiff in error.

Howel, for the defendants in error.

By Court, SERGEANT, J. The English practice in relation to sales by the sheriff of goods levied on by *fiери facias*, differs from ours, and the same rules are not always applicable. In England, it is said, the sheriff is not obliged to sell by auction, and if he do, the expense of the auctioneer and of the inventory will fall upon himself: Buller, J., 2 T. R. 157,¹ cited, Wats., Sheriff, 188. And if sold by auction much below their real value, the sheriff is liable to an action: 3 Camp. 520.² The duty of the sheriff is to sell at private sale, and it seems, if this be fairly done on a *fiери facias*, the sheriff is not liable to an action, though the property be sold much below its real value: 1 Stark, 43.³ The reason is, that the sheriff may sell to the plaintiff himself, at an appraisement, and therefore, the plaintiff ought not to be allowed to object to the amount for which the sheriff sold, or even to his omitting to sell for want of buyers on a *venditioni exponas*: the court saying, if the plaintiff were dissatisfied, he might have set up a purchaser of the goods himself: 1 Bos. & Pul. 359.⁴

Under our practice, goods levied on by *fiери facias*, are sold by the sheriff at public vendue, and it is believed have always been so. The auction laws exempted from their prohibitions sheriffs, who sold by vendue, goods taken in execution. The act of the twenty-first of March, 1806, sec. 11, directs the sheriff or coroner to whom is directed any process of execution for the recovery of money, to proceed to collect the same, and, if the defendant refuse or neglect to pay the debt and costs, to levy on his personal estate, and thereafter make sale thereof, first having given six days' notice, by not less than six handbills, to be put up at such places as he shall deem best calculated to give information, and with the money arising from such sale, to pay the debt and costs, and make return at the next court.

In the absence of any directions from the plaintiff, the sheriff pursues the exigency of his writ by selling at public sale, and

1. *Woodgate v. Knatchbull*.

2. *Keightley v. Birch*.

3. *Barnard v. Leigh*.

4. *Leader v. Danvers*.

if he is guilty of no fraud or neglect in relation to such sale, is not answerable to the plaintiff, although the goods may have brought an inadequate price. A grossly inadequate price may be evidence of such fraud or neglect in the discharge of his duty, but does not, *per se*, give the plaintiff a right of action. The plaintiff has, or is presumed to have, notice of the public sale, and has power to attend and purchase like any other individual, or may, so far as respects himself, delay it by his directions to the sheriff. If he neglects to give directions, or to attend the sale, the sheriff can not know whether he desires a peremptory sale or not. A case may be easily supposed, where the plaintiff having other security for his debt, would be indifferent what price the goods brought, and would complain if the sale did not proceed. Neither the act of assembly, nor our practice, seems to make any difference in the duty of the sheriff, whether the proceeding is on a *feri facias* or *venditioni exponas*. In both, in the absence of other directions, he complies with his duty by advertising and selling. How far he might, from a regard to the defendant's interest, be required or authorized to postpone a sale where the goods would be palpably sacrificed, is another question: but as to the plaintiff in the execution, it is clear, that unless the sheriff is guilty of fraud or neglect, he is not answerable for merely proceeding to the sale of the goods as required by his writ, though they bring an inadequate price.

Judgment reversed, and a *venire facias de novo* awarded.

YOUNG v. GLENDENNING.

[6 WATTS, 509.]

PAROL GIFT OF LAND TO A CHILD, accompanied by permanent improvements, gives an indefeasible title to have the contract executed.

COMPENSATION FOR IMPROVEMENTS by perception of profits is not a bar to the specific performance of a gift.

EJECTMENT by Glendenning against Young. The plaintiff held the title originally, but defendant claimed that he had made a parol gift of the land to her. Much evidence was taken on this question, but the only one presented on appeal was as to the correctness of an instruction to the jury as follows: "If you are satisfied from the evidence that the plaintiff made a parol gift of the land to Mrs. Young, and possession was taken in pursuance of the gift, and valuable improvements made, and

that Young has not been fully compensated, then your verdict will be for the defendant.

Holstein, for the plaintiff in error.

Pearson, *contra*.

By COURT. The direction was, that the compensation for improvements by perception of profits, may be a bar to specific performance of a gift. On that ground, the equitable title would always be defeasible, for a time must come, when compensation will be complete; and the right of the donee would depend on the time when he called for the conveyance. Nor would equity be bound to help him to it, though called for at the earliest period, as it would be sufficient to protect his possession, till satisfaction should be had from the land. But whatever room for objection to specific performance there might originally have been, there is no rule of equity better established, than that encouragement to go on with improvements under an expectation of a conveyance, is a ground to disappoint the deceiver, by compelling him to realize the expectations he has raised. Compensation is the opposite of performance, and so treated by Lord Alvanley, in *Forster v. Hale*, 3 Ves. 713, who in objecting to the original course of the court, thought that compensation, instead of execution, ought to have been the redress in all cases. Slight and temporary erections for the tenant's own convenience, doubtless give no equity; but permanent improvements give an indefeasible title to have the contract executed.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Gauger v. Fry*, 17 Pa. St. 495.

SPECIFIC PERFORMANCE OF A GIFT OF LANDS.—Whether a court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make large expenditures in valuable improvements on the land, is a question on which the authorities do not agree. In the latter part of the note to *Anderson v. Green*, 23 Am. Dec. 429-431, the authorities on both sides of this question are cited and reviewed.

CUMMINS v. SCOTT.

[6 WATTS, 519.]

JUSTICE OF THE PEACE CAN NOT MAINTAIN AN ACTION against two persons for having maliciously conspired together, by which he was induced to marry one of them, a minor, by reason of which he was subject to a penalty and costs.

ACTION on the case for a conspiracy. Plaintiff set forth in his declaration that he was a justice of the peace of Allegheny county, and that the defendants, George Scott, a minor, and Patrick Baily, had conspired and confederated together to procure the marriage of said George without the consent of his parents, and that by such conspiracy, and by representing to plaintiff as such justice that the said George was over twenty-one years of age, they had induced him to marry the said George to one Nancy Cull. That the parent of George had sued him for such marrying, and he had been compelled to pay fifty pounds, the penalty provided by the act of the assembly of February 14, 1829, and certain costs and expenses. The court below instructed the jury that plaintiff could not recover.

McCandless, for the plaintiff in error.

Hamilton and Forward, contra.

By Court, GIBSON, C. J. It is said by Hawkins, b. 2, c. 23, sec. 2, that a naked lie is not indictable; and it might, *a fortiori*, seem that it is not actionable for the reason given, that it is less dangerous when unaccompanied with a token or device. It appears, however, that the office of tokens and devices, which are only the indices of a general intent to defraud, is not to aggravate the turpitude of the act, but to raise it above the level of a private injury, by giving it a public character; and it seems to be agreed, that most of the wrongs included in the definition of Hawkins, are now redressed by action only: 3 Chit. Crim. L. 994. But whatever be the restriction put on the public remedy, it is certain that actions have been maintained, from the earliest times, for private wrongs effected indifferently by false tokens or fraudulent representations; as is shown, among other instances, by the anonymous case in Skinner, 119, where the defendant responded in damages, for having procured the plaintiff to marry him, by affirming himself to be single; as well as by the familiar and more modern instances of actions, for fraudulently representing an insolvent trader to be worthy of credit. The general principle therefore is, that such an action lies; subject, however, to the limitation put on it in *Vernon v. Keys*, 12 East, 632, that it be for something more than a gratuitous dictum about a fact which the speaker was not bound to disclose, and on which it was the folly of the hearer to rely.

In the case at bar, it is undoubtedly true, that the damage sustained, and not the conspiracy, is the substantive ground of the action—a principle which makes it unimportant; that ob-

ject was not in fact to prejudice the plaintiff: still there is another, and an insuperable impediment in his way. The principal, perhaps the only design of the penalty, would be prostrated, were the offender suffered to reimburse himself. Had no more than compensation been intended, a power to graduate it to the injury would doubtless have been given; for it could not have been supposed that the true measure of it would be the same in all cases, or that fifty pounds would be adequate in any case; yet its adequacy to correction, is undoubted. Would it be so, if the offender might harbor a thought of reimbursement? A possibility of it would gain from him a more ready compliance with solicitation; and that furnishes a decisive reason for precluding the hope of it. To sustain his action would induce more danger of conspiracy against the parent than there is, at present, of conspiracy against the magistrate. To secure him from consequences, would require no more than a precautionary declaration by the married couple, of freedom from adverse obligation; for no master or parent would sue for the penalty, were it the ultimate effect of his action to consign the apprentice or child to a prison, and thus even compensation would be eluded. The result would be, to give an action to the father against his child. Why should an offender have an action for what is his negligence as well as wrong? The letter of the statute is a guide which can not deceive him, and when he chooses, in preference, to follow the dictates of his fancy, he can not complain that it has misled him. His coadjutor is not more culpable than he; and it comports not with the policy of the law to interfere between them.

Judgment affirmed.

STOEVEER v. RICE.

[8 WHARTON, 21.]

MORTGAGEE PURCHASING AT HIS OWN SALE need not be required to pay the money which he is entitled to have repaid him as such mortgagee; and if, after such sale, no money is paid the sheriff, the latter agreeing to accept the mortgagee's receipt in lieu of money, and the costs remain unpaid, and the sheriff, though he has executed a deed, has never acknowledged it, nor has he received the mortgagee's receipt, the purchaser has nevertheless acquired title so that a subsequent sale under a junior lien is inoperative.

EXORTMENT by Stoever against Rice. The latter was tenant under Robert Fleming, to whom the premises had been sold by the sheriff in 1822. The sheriff did not exact payment of the

purchase price, but agreed to take the mortgagee's (Fleming's) receipt therefor. A deed was made to Fleming, and notice given him that it was lying in the sheriff's office. Fleming took possession soon after the sale; but he never gave the sheriff a receipt for the purchase money, nor did he take the deed, or settle the costs. In 1828 the premises were sold under a *venditioni exponas* to the plaintiff, who obtained his deed and brought this action. The jury, under instructions, found for the defendant. Plaintiff sued out a writ of error.

C. Ingersoll and Mr. Randall, for the plaintiff.

J. R. Ingersoll and Mr. Rawle, for the defendant.

By Court, GIBSON, C. J. It is unnecessary to say whether the mortgagee could have defended his tenant's possession on the mortgage alone; yet it may not be amiss to say it would be difficult to show that the judicial sale, at which the plaintiff purchased, as the law then stood, had not extinguished it as an incumbrance merely. Nothing, however, is clearer, than that the mortgagee had acquired an inchoate right, which was superior to that of an incumbrancer, by his purchase under his own *levari facias*, and consequently an estate in the premises. When this court decided, as it did in *Scott v. Grenough*,¹ that the sheriff may sue on the contract for the purchase money, it virtually decided the question before us; for it is impossible to conceive how a contract can be enforced without mutuality of remedy, not, perhaps, by mutuality of action, in a case like the present, but by an application on the part of the purchaser to the summary power of the court; and we must therefore take a sale by a sheriff, to be attended with the ordinary incidents of a sale by an individual. On payment or tender of the purchase money, the vendee is invested with an equitable title, of which he can not be divested, and which the law furnishes him with means to complete, by having the legal title added to it. Now there is nothing in the way of an agreement to exchange acquittances, as a substitute for circuitous payment, to authorize a subsequent judgment creditor, who had not a right to touch a farthing of the money, to interfere with it.

How far the plaintiff was entitled to rule the money into court is not the question, as he attempted not to do so; yet it may be said, that a court, in the exercise of its legitimate discretion, would not be bound to expose a purchaser at his own sale, to the vexation, and perhaps loss, of raising money to

¹, 7 Serg. & R. 197.

gratify the malice or caprice of a subsequent incumbrancer, who had not an interest in it, by a formal and circuitous payment back to himself. But whatever may have been the plaintiff's power in this respect, he did not, as I have said, attempt to exert it; and the arrangement of the sheriff with his vendee, was valid, at the return of the writ. What intervened to invalidate it? Seven years had elapsed without interchange of acquittances, payment of costs, or acknowledgment of a conveyance, though one had been sealed, when the subsequent judgment creditor proceeded to execution. But what had he to do with that? It was not his business to provide for the costs of his competitor's action, or force the parties to close the transaction, by a conveyance of the title. That was a matter betwixt the vendee and the sheriff's representatives, who would have been liable to the subsequent incumbrancers for the surplus, had there been any. I have known more than one case of retention for the sheriff's security, while the title passed as to every one else. If the sale were regular, the plaintiff had ceased to have an interest in it; and if it were not, his course was an application to have it set aside. Abandonment of the contract to let in execution by other judgment creditors, was out of the question. The possession taken by the vendee, under his purchase, and his applications to the court to enforce a conveyance—inoperative, it must be admitted, in every other aspect—furnish a conclusive rebuttal of every adverse implication from lapse of time. They show that he considered his debt as paid, and his ownership as entire, in respect to everything but a formal transfer of the title; and why may not that be added still? If the proper parties choose to consider the purchase money as received on the one hand, and the mortgage debt as paid on the other, it is their own concern. The question is, whether a subsequent judgment creditor can interpose to overturn a judicial sale collaterally, because its consummation may have been unusually delayed; and it has regard, not more to title in the defendant's landlord, than to want of it in the plaintiff. By force of the sale, if not collusive in its origin, the property was in *gremio legis*; and nothing was left for the action of a subsequent execution. The question of fraud has not been agitated here, having been submitted to the proper tribunal; and it was properly said to be the only debatable ground in the cause.

Judgment affirmed.

305, upon the point that a sale by a sheriff is attended with the ordinary incidents of a sale by an individual. Also in *Bellas v. McCarty*, 10 Watts, 22, to the effect that a purchaser at a sheriff's sale before his deed has been acknowledged has an inceptive interest in the land by the contract. See also *Penington v. Coats*, 6 Whart. 283.

SMITH v. STARR.

[3 WHARTON, 62.]

PROCEEDS OF REAL ESTATE BEING DEVISED, the devisees may elect to take the fund either as land or as money.

DEVISE TO USE OF A., WITH POWER OF DISPOSITION BY WILL, and in default of will, then to her daughter, vests in A. an absolute estate in fee. A RESTRICTION INCONSISTENT WITH A GENERAL POWER OF DISPOSAL is inoperative.

WHEN COVERTURE CEASES, THE CLAUSE AGAINST ANTICIPATION, in a settlement in trust for a married woman, is no longer binding.

GIFTS TO A FEME-SOLE OR HER TRUSTEES to her separate use, free from the control of any future husband, and not subject to his debts or disposition, are, as to such restraints, void, unless they are settlements made in immediate contemplation of marriage.

IF A DEVISE BE MADE TO A. IN TRUST FOR B., A MARRIED WOMAN, for her separate use and not liable to her husband's contracts or control in any manner whatever, a conveyance made by A. and B., after the death of the latter's husband, and while she is a *feme-sole*, is valid, and passes an absolute, indefeasible title.

ACTION by Smith and wife against Starr, for damages, in not complying with a contract of purchase of certain realty. This realty formerly belonged to Rebecca Shoemaker. She died testate in 1820. By her will she authorized her executors to sell and convey the premises in question, and the moneys to arise therefrom she bequeathed to her daughters, Anna Clifford and Margaret Wharton, and her son William Rawle, equally; but Anna's share to be held by her brother William in trust for her separate use, and not to be liable to her husband's contracts or control; Anna to have the power of disposition by will, notwithstanding her coverture, and in default of such disposition the property to go to her daughter Rebecca. In 1824, Anna Clifford, having become a widow, joined with her brother William in a conveyance of the property to Margaret Wharton, under whom the plaintiffs held title. The question was, whether the plaintiffs' title was perfect.

T. I. Wharton, for the plaintiffs.

William Smith, for defendant.

By Court, ROGERS, J. This action is brought to recover damages for the non-performance of an agreement to purchase a certain messuage and lot of ground, etc. The question is, whether the title to the messuage and lot of ground is vested in the plaintiff in fee. The facts of the case are contained in a case stated, in the nature of a special verdict. The doubt arises on the conveyance of William Rawle and Mrs. Oliford to Margaret Wharton. The plaintiffs' counsel contend: First, that the conveyance may be considered as an execution of the power given by the will of Rebecca Shoemaker; and, second, that it may be viewed as a conveyance or release by two out of three devisees, to the third, and therefore valid.

It is unnecessary to rest the question on the first ground, as we are clearly of the opinion the title is good on the second. The testatrix empowers her executor to sell and convey her house and lot in Callowhill street, and also such ground rents, not already devised, as may remain her property at the time of her death. The moneys thence arising, together with her other personal property and estate, etc., she gives and bequeaths to her two daughters, Anna Clifford and Margaret Wharton, and her son William Rawle, equally to be divided among them; but the share allotted to her daughter, Anna, is to be held by her brother in trust for her separate use, and not to be liable to her husband's contracts or control in any manner whatever. The testatrix gives her a power to dispose of the same, by any writing in the nature of a will, notwithstanding her state of marriage. And if she should die, without having made such disposition thereof, then the said personalty goes to her daughter Rebecca. By the will of Mrs. Shoemaker, therefore, her property is directed to be equally divided between Anna Clifford, Margaret Wharton, and William Rawle, with a power to sell. It is well settled, that when the proceeds of real estate are devised, the persons beneficially interested may elect to take the fund as real estate. The devisee may take it either as land or money: Leigh & Dalzel on Conversion, c. 8, pp. 119, 170, 179, 180; *Burr v. Sim*, 1 Whart. 265 [29 Am. Dec. 48.] I entertain no doubt that the deed of two of the legatees to the third may be taken as an election to take the fund as real estate. Nor can the right of William Rawle to convey, or of Margaret Wharton to receive the conveyance, admit of doubt: and as to the right of Anna Clifford, we consider it as a question more of novelty in this state, than as presenting any real difficulty, either in principle or authority. By the will of Mrs. Shoe-

maker, the one third of the property is vested in William Rawle, to the separate use of Anna Clifford, with a power of disposition by will, and in default of appointment, over. Independent of the fact, that at the time the devise took effect, Mrs. Clifford was a married woman, it is clear that such a devise would give her an absolute estate in fee. *Jackson v. Robins*, 16 Johns. 537, is full to this point.

Chancellor Kent, after a full review of the authorities, lays it down as an incontrovertible rule, that when an estate is given to a person generally, or indefinitely with a power of disposition, it carries a fee; and the only exception to the rule is, when the testator gives the first taker an estate for life only, by certain and express words, and annexes to it, a power of disposal. If this be so, and her deed with the joint devisees of the fund would have been good, then the question is, whether her being a *feme-covert*, at the time of the death of the testatrix, although discovered, or *sui juris*, at the execution of the deed, will invalidate it. A restriction, inconsistent with a general power of disposal, is as ineffectual and inoperative, in the case of a female, as that of a male. It is only on marriage, that her disability, which in truth is intended for her protection, commences. At law a wife can have no separate estate; but a court of equity permits such an estate, for the protection of the wife, against the legal rights of the husband. When, therefore, coverture ceases, and of course she is not subject to control, there can be no reasons why the conditions and restrictions should not cease also. Thus in *Barton v. Briscoe*, 4 Con. Ch. 283,¹ and in *Benson v. Benson*, and *Knight v. Knight*, Id. 199, 200,² it is held, that on a settlement in trust, for the separate use of a married woman for life, the clause against anticipation, as it is called, becomes inoperative on the death of the husband, and no longer binding. *Barton v. Briscoe* is very like this case, for there it is held, that on a settlement in trust, for the separate use of a married woman, for life, but so as not to anticipate, with remainder, as she should appoint by will, and in default of appointment to A., on the death of her husband, the restraint on anticipation ceased, and that she was entitled, with the concurrence of A., to a transfer of the fund. And in *Benson v. Benson* the testator directed the interest of ten thousand pounds, to be for the separate use of his daughter, Jane Lane, the wife of T. Lane, for her life, free

1. 4 Eng. Ch. Cas. 603; 1 Jac. 603.

2. Error. See *Kirke v. Kirke*, 4 Eng. Ch. Cas. 435; 4 Russ. 435.

from the debts of her husband. The husband died, and the widow married again; it was held that the separate use ceased, on the death of her husband.

The principle upon which the cases in equity proceeds is, that unless the female to whom the gift be made, be married at the time, the interest vests, and unless the coverture be continuing down to the moment when the alienation is attempted, a female of full age stands on precisely the same footing as a male, and equally with him, may exercise all the rights of ownership, notwithstanding a clause against anticipation and against marital interferences. The trust fund is at her free disposal, while she is *sui juris*; and a court of equity only gives effect to the restriction upon her marriage, and while remaining married, against marital rights: 2 Kent Com. 165, note. It has been also held, that gifts to a *feme-sole*, or to trustees in trust for a *feme-sole*, to her separate use, free from the control of any future husband, and not subject to his debts, or disposition, are, as to such restraints, illegal and void, unless they be settlements made in immediate contemplation of marriage: *Woodmester v. Walker*, 6 Con. Ch. 457;¹ *Evans v. Hughes*, 7 Id. 572;² and so far has this principle been pushed, that in *Newton v. Reid*, 4 Sim. 141, the vice-chancellor held that though the annuity was given by will, in trust for a daughter for life, not subject to the debts or control of any future husband, nor alienable by her, and intended for her support, and she married, the restrictions were still void, and she and her husband might sell the annuity, and apply the proceeds to pay his debts, and for his use. But this doctrine would impose an unreasonable restriction upon the power of parents to provide for the future support of their daughters, and is not, as I conceive, the law, as applicable to this state. In this case it was evidently the testatrix's intention to guard against the control of the husband: but if the restriction had been expressly extended to any future husband, the case might have been altered; although I do not intend to express any opinion on the point. In the intermediate time, however, between the first and second marriage, upon the principles above stated, she would have an undoubted right to convey her interest. But be this as it may, we are of the opinion that upon the case stated, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

The principal case is a leading one in Pennsylvania, and it has been frequently cited with approval upon the different points therein determined. It

was cited in *Hannah v. Swarner*, 3 Watts & S. 231; *Stuck v. Mackey*, 4 Id. 197; *Willing v. Peters*, 7 Barr. 290; and *Neely v. Grantham*, 58 Pa. St. 442, upon the point that where land is directed by will to be sold and the proceeds paid to certain persons, they may elect to take either the land or money. Also in *Beatty v. Byers*, 18 Id. 108, and *Beal v. Stehley*, 21 Id. 348, that such election must be by some unequivocal act assented to by all interested, and that a conveyance by two legatees of all their interest to a third amounted to such an election. Also, *Willing v. Peters*, 7 Barr. 287; and *Evan's Appeal*, 63 Pa. St. 186, that where land is directed by a testator to be sold and the money paid to a certain person, a judgment against the latter will not bind his interest in the land directed to be sold, because he is seised of no estate which can be made the subject of a lien, and consequently a sheriff's sale of the legatee's supposed interest in the land passes nothing to the purchaser. Also in *Fox v. Scott*, 2 Phila. 151; and *Estate of Harris*, 3 Id. 326, that the separate use of property intended for the protection of a wife against her husband, ceases when the coverture ceases, and the trust fund is again at her disposal. In *Girard Life Ins. Co. v. Chambers*, 16 Pa. St. 490, the principal cases is stated to have been decided upon the principle stated by Chancellor Kent in *Jackson v. Robins*, 16 Johns. 588, that "where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is, when the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion." See generally, upon the question of trusts and the rights and duties of trustees to whom property is conveyed to hold for the separate use of married women, *Wells v. McCall*, 64 Pa. St. 213; *Dodson v. Ball*, 60 Id. 495; *Kay v. Scates*, 37 Id. 39; and *Kuhn v. Newman*, 26 Id. 231, all citing the principal case.

GIFT TO WIFE'S SEPARATE USE, what necessary to make valid and effectual: See *Carrroll v. Lee*, 22 Am. Dec. 350; *Hamilton v. Bishop*, 29 Id. 101. A bequest to a married daughter of a testator, with a limitation to the heirs of her body in case of her death, does not indicate an intention to limit the bequest to her separate use; and the property bequeathed will be subject to the marital rights of her husband: *Krause v. Beitel*, 23 Id. 113.

THOMPSON ET AL. v. GARWOOD ET AL.

[3 WHARTON, 287.]

UNDER A DEVISE TO A. FOR LIFE, AND AT AND FROM HIS DECEASE to his children and their heirs and assigns, the distribution is not to take place till his death, and must be to such children as survive him.

A DEVISE TO CHILDREN GENERALLY, NOT LIMITED TO ANY PARTICULAR PERIOD, includes those children only who are living at the death of the testator.

A DEVISE TO ONE FOR LIFE, AND THEN TO HIS CHILDREN, will include all his children up to the time of his decease, whether born after the decease of the testator or not; and whenever the distribution among children is postponed to any particular period by a will, all the children will be included who are in existence when such period arrives.

A GENERAL POWER is a power to appoint whomsoever the donee pleases.

A PARTICULAR POWER is one by which the donee is restricted to particular objects.

A POWER GENERAL IN TERMS will not be cut down to a particular power, unless an intent to do so is apparent from the instrument conferring the power.

WILLS EXECUTED UNDER POWERS ARE CONSTRUED the same as proper wills, and are not affected by the instrument by which the power was conferred, except by the clause by which the power is created.

A DEVISE TO EXECUTORS TO HOLD IN TRUST, to permit R. K. F. to receive the rents and profits for life, and at and from his decease to convey to his children, their heirs or assigns, makes it obligatory on the trustees to convey to such children as R. K. F. may have at the time of his decease. Hence he is not entitled to a conveyance of the legal estate on the ground that the only children which he had at the date of the will and of the death of the testatrix have since deceased, leaving him their sole heir.

BILL for conveyance of legal estate. The facts sufficiently appear from the opinion.

Mr. Cadwalader, for the complainants.

J. S. Smith, for the respondents.

By Court, SERGEANT, J. It appears by the petition and answer, that Hannah C. Fisher was the niece of Henrietta Ware, and the latter, by her will, devised the real estate in question to trustees, in trust for the separate use of Hannah C. Fisher for life, with remainder to her child or children surviving her, or their children, taking *per stirpes*. If, however, Hannah C. Fisher died without leaving such child, etc., surviving her, or if living, they died in their minority, then the estate should go, and she devised the same, to such person or persons, and for such estate and estates, and in such manner and form, as she, the said Hannah C. Fisher, by her last will, or any writing, etc., intended as such, should nominate, direct, and appoint—and for want of such appointment, to Robert Knox Fisher, in fee simple. Hannah C. Fisher intermarried with Joseph S. Snowden, and died without leaving any child, or the issue of any. She made a will, and intending to execute the power, devised the premises to her executors in fee, in trust, to permit and suffer her brother, Robert Knox Fisher, to receive and have for his own use, all the clear rent, income, and produce thereof for and during the term of his natural life; and at and from his decease, to convey the same to the children of the said Robert Knox Fisher, their heirs and assigns forever, in equal shares and proportions. At the time of making this will, and death of Mrs. Snowden, Robert Knox Fisher had two children, a daughter and a son,

both since dead, at the respective ages of three and seven years. The prayer of the petition is, that the trustees (new ones appointed in place of the former, who died) may convey the legal estate to the petitioner, who is the alienee of Robert Knox Fisher and his wife.

To this petition an answer has been filed; and the question is, whether the devise over by Mrs. Snowden, in execution of the power, after the termination of the estate for life of her brother, Robert Knox Fisher, conveyed a vested estate in remainder, solely to the children which he had living at the date of her will and her decease; or whether children that might happen to be born after the death of Mrs. Snowden, should not be let in. In the latter case, as he is living, there is a possibility of his yet having other children born; in which case the trust must continue for their benefit; in the former, it is contended on behalf of the petitioner, that the vested estate in fee in the two children, descended on the death of the survivor of them, to their father, Robert Knox Fisher, and united with his life estate, so that he became tenant in fee simple thereof.

Taking into view only the clause in the will of Mrs. Snowden on this subject, it would seem, that the devise was not limited to the children which Robert Knox Fisher had at her decease, but extended to the children he might afterwards have during the rest of his life-time. The devise is of an estate for life in Robert Knox Fisher, and at and from his decease, to convey the same to the children of the said Robert Knox Fisher, and their heirs and assigns forever, in equal shares and proportions. There is no express limitation to the children then living who may be supposed to have been known to Mrs. Snowden.

In the absence of any such preference, it is a decisive circumstance, that the conveyance is not to be till, at, and from his decease. That was marked out by the testator as the period when the distribution was to be made, and in the mean time, and during his life, all the income and profits were to go to the use of the father, Robert Knox Fisher. The case appears to fall within the rule settled by this court in the case of *Pemberton v. Parke*, 5 Binn. 611 [6 Am. Dec. 432]. There the testator gave the bulk of his estate "to his widow, during her life or widowhood, and to the children and grandchildren of his brother Israel Pemberton, to be equally divided among those of them who may be then living, two thousand pounds;" and the word, then, was agreed to refer to the death of the widow. It was held that until the death of the widow, the legacy did not vest,

but was suspended, and was clearly contingent, as to such of the descendants as should survive the widow. And the rule is thus laid down by Mr. Justice Yeates: "It is impossible to reconcile all the different decisions on this branch of the law. It would seem, however, that this general rule may be collected from the cases. When the devise or gift to the children is general, and not limited to a particular period, it is then confined to the death of the testator: *Northey v. Burbage*, Prec. Ch. 470; *Heathe v. Heathe*, 2 Atk. 121; *Horsely v. Chaloner*, 2 Ves. 83; *Isaac v. Isaac*,¹ Amb. 348. But when such devise or gift is to one for life, or when the distribution is postponed to a future time, there, children born during the life, or before the time of distribution, are let in: *Harding v. Glynn*, 1 Atk. 470; *Graves v. Boyle*, Id. 509; *Haughton v. Harrison*, 2 Id. 329; *Ellison v. Airey*, 1 Ves. 111."

But it is contended, that whatever may be the construction of this clause, as it stands alone, yet that a different intention is evinced in the first place in the will of Mrs. Ware, the donor of the power, and in the next place in the will of Mrs. Snowden, the donee.

And first, as to the will of Mrs. Ware. I am not able to comprehend in what way any language in the will of Mrs. Ware in her distribution of other property by other clauses of her will, among children or other persons, by which she explicitly extends her bequests to children surviving or afterwards to be born, can affect the present question. For it is to be observed, that this is a general power given by the will of Mrs. Ware to Mrs. Snowden, and not a particular or limited power. The estate is to go, in default of children, etc., of Mrs. Snowden, to such persons, and for such estate, and in such manner, as she should by will, etc., appoint. She might limit and appoint it to go to any person or persons she pleased, though they were utter strangers to Mrs. Ware and to her, and that in fee, for life or lives, or for such other estates as she should choose to carve out. Had Mrs. Ware invested her with a power to appoint to such and such children, then her intent, as inferable from the language of other portions of her will, might perhaps be resorted to for the purpose of ascertaining the extent of a power, in case of a doubt. But where she gives a general and unlimited power, which may or may not afterwards be exercised in favor of anybody's children, how can her description of the children who are to take under other devises or bequests be of any im-

1. *Hodges v. Isaac*.

portance? Or how can it be, that a general power shall be in this way cut down to a limited one? For the law has established an important distinction between general and particular powers. By a general power is understood a right to appoint to whomsoever the donee pleases. By a particular power is meant, that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, but because it enables him to give the fee to whom he pleases. He has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so. Therefore whatever estate may be created by a man seised in fee, may equally be created under a general power of appointment: and the period for the commencement of limitations, in point of perpetuity, is the time of the execution of the power, not of the creation of it: 1 Sug. Pow. 495. A power general in terms will not be cut down to a particular power, unless there is an apparent intent: *Bristow v. Warde*, 2 Ves. jun. 336. There is no such intent apparent in the will of Mrs. Ware, as that Mrs. Snowden's power should be limited in favor of particular children of Robert Knox Fisher, or indeed in favor of any of his children.

It is contended, that it is a rule, that the appointee must claim under the instrument creating the power, and that both the instrument creating and the one executing the power must be read together. And that is true, so far as respects the question how the estate is created, but not as to what is created. Thus it is laid down by Lord Hardwicke, in the case of *The Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, and other cases cited by the counsel for the petitioner, that the appointee takes in the same manner as if the power and instrument executing it were incorporated in one instrument. So it is in appointments to uses. If a feoffment be executed to such uses as the feoffor shall appoint by will, when the will is made, the *cestui que use* is in by the feoffment. But when it was attempted to push this rule to the extent, that the acts done in consequence of, and by virtue of an authority and pursuant thereto, were the acts of the old proprietor, and even of that day when he, by virtue of his ownership, delegated that authority, Lord Hardwicke overruled the attempt; and indeed it would seem to lead to consequences too paradoxical to be

admitted. On the contrary, the rule is, that the construction of the instrument executing a general power is the same as if the donee had made a conveyance by deed or will. In the execution of powers, says Mr. Sugden (1 Sug. Pow. 556), by deed or other act *inter vivos*, technical expressions are as necessary in the limitation of the estate as in feoffments or gifts at common law. Therefore, if, under a power, the estate be appointed to A., and the deed express or limit no estate, the appointee will take an estate for life only. And so, in every other case which may be put, the construction would be the same as upon a feoffment at common law. A different construction is not to be made on conveyances to uses from that which is put on common law conveyances; the same rule of construction applies to both: 3 T. R. 765.¹

Wills executed under powers receive the same construction as proper wills. In the *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, Lord Harkwicke said, "so if a power is given by a deed to appoint lands by will, and the person to whom the power is given makes a will, and gives the land to A., and to his issue, the law says, that though such appointee takes under the power, yet the execution of the power being by will, it shall receive the same construction as a devise of lands, viz., an estate tail." So, if it had been to A. forever, that would have been an estate in fee. It was never doubted, but that the construction of the words should be exactly as if he took strictly and properly under the words of a will. And conformably to this opinion, in a later case of an execution of a power by will, Lord Hardwicke held, that although the will was not a proper will, yet that the words of it were to have the like construction as if it was a proper will: for otherwise there would be a strange confusion in the construction of writings, if they were to have one construction when proper wills, and another when improper. The words, therefore, are to receive the same liberal and beneficial construction, as the words in a proper will. And he determined an informal limitation to be an estate tail, although it clearly could not have been so construed, had it been contained in a deed: *Southby v. Stonehouse*, 2 Ves. 610.

All these authorities, as well as the plain and obvious nature of the case, seem to show, that this being a general power to Mrs. Snowden, her intention, as expressed in her will, is alone to be regarded, in determining the construction to be put on its execution by her will; and that other clauses in the will of Mrs. Ware, the donor, not relating to the power, can not affect

1. *Doe v. Morgan*.

that construction, as she could not possibly foresee how Mrs. Snowden might choose to dispose of the estate, or whether she would give it to any children at all, born or to be born, but left it to her to do as she pleased. Nor is it to be presumed, that Mrs. Snowden looked at Mrs. Ware's other devises, or had any view to her wishes in her various dispositions or use of words, any more than an attorney in fact executing a power to sell lands, is to be supposed conversant of the deeds or instruments executed between his principal and other parties.

Nor am I able to discover anything in the will of Mrs. Snowden that goes to change or vary the disposition made according to the rules of law by the clauses in question. They relate to other estates and other devisees, and whether she chose in relation to them to use the same, or different words, does not in the present case aid us in discovering the intention contended for. In one clause she selects a daughter of Mrs. Fuit, then living, whom, by name, she makes sole devisee, if she survived Mrs. Fuit, but if she died, and her mother left lawful issue, then the estate was to be conveyed to them; in case she left none, then to the children of the testator's brothers and sisters in equal shares. Another clause gives to John Fisher, for life, in the same manner as is done in relation to the premises now in question. Another is to the children of Mrs. Hill. These dispositions do not seem to elicit anything that develops the intent of Mrs. Snowden as to the children of Robert Knox Fisher in the devise relating to them, so as to control its interpretation and legal effect; and it must therefore be construed by itself. According to that construction, it was a devise of a contingent remainder to all the children of Robert Knox Fisher, born, or to be born; and as he appears on these proceedings to be yet living, and therefore in contemplation of law may have children, the trust must remain for their benefit.

Petition dismissed.

Cited in *Bingham's appeal*, 64 Pa. St. 349, to the effect that the intention of the donee of a power is the true criterion to determine the mode and extent in which it should be executed. That such intention must appear in the instrument itself, and that the instrument must refer to the power to be executed, or actually dispose of the subject of it.

POWERS.—A naked power or authority may be revoked at pleasure: *Mansfield v. Mansfield*, 16 Am. Dec. 76. A power coupled with an interest exists when the person to whom the power is given derives a present or future interest in the subject over which the power is to be exercised: *Id.* As to who may exercise a power of sale given in a will, see *Lockwood v. Stradley*, 12 *Id.* 102, note. As to execution of power by attorney, see *May v. France*, 14 *Id.* 159, 170, note.

DORRANCE v. SCOTT AND WIFE.

[8 WHARTON, 309.]

BOND AND WARRANT OF ATTORNEY OF MARRIED WOMAN, though her husband join with her, is void; so also are the judgment entered on such bond and a sale of her estate made thereunder.

COVERTURE MAY BE GIVEN IN EVIDENCE under plea of *non est factum*.

JUDGMENT ON SCIRE FACIAS against a married woman, founded on a void judgment, is also void.

A MARRIED WOMAN'S POWER TO BARGAIN AND SELL her separate estate by deed executed in the presence of two or more witnesses, does not have the effect to make valid a bond and warrant of attorney executed by her, and which does not purport to convey or affect her realty, and a judgment under such bond is no lien on her realty.

WRIT of error from Bucks county. Elizabeth Scott, on October 28, 1823, being the devisee of certain realty, her husband, Thomas M. Scott, conveyed all his interest therein to James R. Scott, in trust, to permit her to manage, let, and demise it, and, notwithstanding her coverture, to bargain and sell such realty by conveyances executed in the presence of two credible witnesses, etc. In April, 1830, said Thomas M. Scott and wife executed a bond and warrant of attorney to confess judgment to David Dorrance for seven hundred and fifty dollars, and judgment was entered thereon on the twenty-eighth day of the same month. In April, 1835, a *scire facias sur judgment quare ex non* issued upon said judgment, and in December of the same year judgment was entered on this *scire facias*. In July, 1824, Scott and wife had made a mortgage on the same property. Under this the lands were sold and a surplus realized. The question in this case was, whether this surplus could be taken under the judgment against Scott and wife, entered up on the warrant of attorney. Judgment was given for defendants in the common pleas.

Mr. Badger, for the plaintiff in error.

Mr. Miles, for the defendants in error.

By Court, KENNEDY, J. The plaintiff here, claims to have his judgment against Thomas M. Scott and Elizabeth his wife, satisfied out of the moneys arising from the sale of land belonging to the wife, of which she was seised in fee. If the judgment was a lien upon it, at the time of the sale, the plaintiff is no doubt entitled to be paid out of the moneys arising therefrom, otherwise not.

From the case as stated, it appears that the judgment was

entered upon a bond and warrant of attorney, executed by the husband and wife, during the coverture of the latter, to the plaintiff. Now, as regards the wife, I take the bond and warrant of attorney to be not merely voidable, but absolutely void. She is considered in law as totally incompetent to execute either. By the common law, a deed acknowledged by the husband and wife binds the husband alone, and can only be enrolled as his deed. It is with a view to protect wives, who are entirely subject to the will of their respective husbands, that courts are not even allowed to take such obligation; and if they do, such acts will be considered extrajudicial: *Gilb. on Uses and Trusts*, 109, 300; 2 *Inst.* 673. The plea of *non est factum* is well supported by evidence of coverture: *Anon.*, 12 *Mod.* 609; *Anon.*, 6 *Id.* 230; *Lambert v. Atkins*, 2 *Camp. Cas.* 272. So absolutely void is the deed or bond of a married woman in contemplation of law, that her coverture at the time of the execution thereof, may be given in evidence, for the purpose of showing that it is so, either under the plea of *non est factum*, or it may be pleaded specially, without being obnoxious to the objection, that it amounts to the general issue, and therefore is not good: *James v. Fowks*, 12 *Mod.* 101; *Lambert v. Atkins*, 2 *Camp.* 273. In this latter case, Lord Ellenborough lays down the following distinction: "If a deed be executed by a married woman, it is absolutely void, *ab initio*; and I have always understood the rule to be, that what shows the deed to be void is good evidence under the plea of *non est factum*; and that a special plea is only necessary where the deed is voidable." See also *Norton v. Turvill*, 2 *P. Wms.* 145, *per* master of the rolls. Accordingly, in *Read v. Jewson*, 4 *T. R.* 362, cited from a note *per* Buller, J., where a *feme-covert*, sole trader, gave a bond and warrant of attorney to enter up judgment, on which the plaintiff took out execution, the court held the warrant of attorney void, and set aside the judgment as entered without authority. "The letter of attorney," says Aston, J., "is an absolute nullity." And in *Lady Chaworth's case*, 1 *Lev.* 51; *S. C.*, 1 *Keb.* 194, pl. 180, the husband having confessed a judgment against himself and his wife, according to a practice that seems to have prevailed to some extent at that day, as for a debt due by the wife whilst sole, upon which he and she were both taken in execution, and it appearing upon examination, that the debt was contracted after marriage, the court discharged the wife from the execution. So the principle of her incompetency to act in such matters, has been extended so far

as to render her incapable of taking a judgment bond to herself personally; and, accordingly, a judgment entered up on a bond and warrant of attorney given by the defendant therein to her, as an indemnity for having become his surety in a bond upon which she paid the money, was held by the court to be void, as well as the bond given by her; and, therefore, the court set the judgment aside: *Roberts v. Pierson*, 2 Wils. 3.

The fact of Elizabeth Scott, the wife of Thomas M. Scott, being a married woman at the time of the execution of the bond and warrant of attorney upon which the judgment was entered up against her, is admitted by the case as stated, which leaves no room whatever for the presumption of any possible ground upon which it can be sustained. It must therefore be deemed, according to all the authorities on the subject, as void against her, for want of authority to enter it; and consequently can be no lien upon her real estate as such. This also determines the want of efficacy in the judgment rendered against her upon the writ of *scire facias*, sued out on the first judgment; because the judgment in the *scire facias* being dependent upon the first as its foundation, must also be considered void as against the wife, for want of a valid judgment to support it: *Dr. Drury's case*, 8 Co. 284; 1 Roll. Abr. 677, pl. 6; see also pl. 2, 3, and 5; 1 Sid. 253; Palm. 187, 302, 303; Cro. Jac. 645.¹ It therefore follows as a necessary consequence, that the interest or estate of the wife in the land sold was not bound by the judgment rendered against the husband and herself in the *scire facias*. And although the judgment is good against him, yet it appears that he had no interest or estate whatever in the land, either equitable or legal, to be bound by it; for he had some six or seven years previously to the giving of the bond and warrant of attorney, whereon the judgment was entered up, conveyed all his interest and estate in the land to James R. Scott, in trust, for the sole and separate use of his wife Elizabeth. Hence he can have no interest in the money arising from the sale of it, unless he be allowed to take advantage of his own wrong or default, by not having paid off the mortgage debt, and thus prevented the land from being sold, as he was bound to have done. He then having no interest in the money, it would seem to follow of course, that the plaintiff, as his judgment creditor, can have no claim to any portion of it, on the ground of interest in the husband.

But it has been argued on behalf of the plaintiff, that the

1. *Appesley v. Ioe*.

bond to him being executed by the wife, "under her hand and seal, in the presence of two credible witnesses," in conformity, as it is contended, to the power and provisions contained in the deed of trust, must therefore be considered as a charge in equity, upon her separate interest and estate in the land sold: and consequently gives to the plaintiff a right to have the amount of his bond paid out of the money arising therefrom. It is true, that by the terms of the deed of trust, the wife is apparently authorized, "notwithstanding her coverture, to bargain and sell, and by deed under her hand and seal, in the presence of two or more credible witnesses, to grant and convey all or any part of the land to any person or persons, and for such use and uses, as she pleases; and to apply the purchase money arising therefrom also as she pleases; or by any instrument of writing in the nature of a will or appointment, executed under her hand and seal, in the presence of two or more credible witnesses, to devise, limit, or appoint the whole or any part thereof, to any uses or purposes that she may think proper," yet still it is difficult to satisfy the mind that a simple obligation, merely for the payment of money, falls within the scope of the authority thus expressed and declared. Whether the wife, being seised of the inheritance in the land, and invested with the legal title thereto, in the same manner after the execution of the deed as before, for it must be observed she did not join in it, acquired a sufficient power by the deed, to dispose of the inheritance in the land, by a deed, even of conveyance, without her husband joining therein, and thus evade, seemingly, the acts of assembly on this subject, which require, in order to pass such interest by a married woman as long as she remains so, that she and her husband should join in the execution of the deed, and that she should be examined touching her voluntary execution thereof before a proper officer, separate and apart from her husband, etc., is a question which need not be inquired into nor decided here; because it appears to be an insuperable objection without more to the bonds being considered a charge upon the land, that there is nothing on the face of it, nor appended to it in any way, going to show that such was the design of the parties. The bare giving of it, without mention therein or reference to the land whatever, though a judgment bond, can not of itself be made to imply an intention that it was given for the purpose of charging the land with the amount of the debt therein mentioned, under the authority contained in the deed of trust: See Clancy on the

Rights, etc., of Married Women, 131 *et seq.* But besides, I am inclined to think that a bond being a mere personal engagement, does not come within the terms of the deed of trust, and that the wife, by means of it, was not thereby authorized, indirectly as it were, to charge the land in question. And it is clear that according to the principle established in *Lancaster v. Dolan*, 1 Rawle, 231 [18 Am. Dec. 625], a *feme-covert* can only charge her separate estate in the manner and form prescribed and provided by the instrument creating and giving her the power. The judgment of the court below is therefore affirmed.

Judgment affirmed.

The principal case has been frequently cited in Pennsylvania, generally with approval. It was cited in *Wallace v. Coston*, 9 Watts, 138; *Wetherill v. Mecke*, Bright. 141; and *Barnett's appeal*, 46 Pa. St. 399, upon the point that a *feme-covert*, in respect to her separate estate, is deemed a *feme-sole* only to the extent of the power clearly given by the instrument by which the estate is settled, and beyond that has no right of disposition. Also in *Caldwell v. Walters*, 18 Id. 82, and *Knox v. Flack*, 10 Har. 338, to show that the bond and warrant of attorney of a married woman to confess judgment are a nullity. A judgment entered upon such bond, in pursuance of such warrant, or otherwise, is a nullity, and a sale upon it conveys no title: *Glyde v. Keister*, 1 Grant, 467; 8 Casey, 87; *Steinman v. Ewing*, 7 Wright, 66; *Williams' appeal*, 11 Id. 310; *Glidden v. Strupler*, 2 P. F. Smith, 403; *Schlosser's appeal*, 8 Id. 495; *Graham v. Long*, 15 Id. 386; *Finley's appeal*, 17 Id. 459; *Rumfelt v. Clemens*, 10 Wright, 456, all citing the principal case. So, in *Gundt's appeal*, 13 Pa. St. 580, it was held that nothing that a married woman might say or do could make her a joint debtor with her husband, citing *Dorrance v. Scott*. Also, in *Hartman v. Ogborn*, 54 Pa. St. 123, that proceedings upon mortgages under the act of 1705 are distinguishable from judgments on bonds against married women. In *Dolson v. Ball*, 60 Id. 495, the principal case is said to follow the decision of Chief Justice Gibson in *Lancaster v. Dolan*, 1 Rawle, 231; S. C., 18 Am. Dec. 625, holding that a donor has a right to control his gift in behalf of a married woman. In *Mellon v. Guthrie*, 51 Pa. St. (1 P. F. Smith), 119, it was doubted whether that portion of the principal case which holds that a judgment obtained in a *scire facias* upon a void judgment is itself void, was sustained by the authorities.

MARRIED WOMEN, agreement of, for sale of their real estate, is void, and can not be enforced in equity: *Butler v. Buckingham*, 5 Am. Dec. 174. So, contracts made by her are void: *Breckenridge's Heirs v. Ormsby*, 19 Id. 71; *Mackinley v. McGregor*, *post*.

CUTHBERT v. KUHN ET AL.

[3 WHARTON, 357.]

RENT CHARGE CAN BE CREATED only by granting an annual sum out of land charged with a clause of distress.

APPORTIONMENT OF RENT WILL BE MADE at the instance of a tenant when a public street is opened through the demised premises; the amount of deduction to which he is entitled must be fixed by a jury.

Surr in equity for the apportionment of rent. A public street had, by lawful authority, been laid out and opened through the leased premises.

T. L. Wharton, for the complainants.

Mr. Hare, for the respondents.

By Court, GIBSON, C. J. This is, in one respect, a more obvious case of apportionment than was *Ingersoll v. Sergeant*.¹ There the act of apportionment was done without the concurrence of the tenant; and had the statute of *quia emptores* been in force here, as it was strangely enough supposed to be till after the second argument, I am unable to see how the necessary consequences of releasing, by act of the party, parcel of an estate burdened with a rent charge, could have been avoided. In England a rent reserved with a clause of distress in a conveyance in fee—in a word, a fee-farm rent—is turned into a rent charge by force of that statute, which, abolishing intermediate tenure while the reservation severs the rent from the indispensable incident fealty, throws the landlord's right exclusively on the clause of distress, as in the case of a rent granted and charged by such a clause on the grantor's land, which is a rent charge proper. But though an extinction of the common law right of distress, reduces rent service to rent charge, a clause of distress added to it is inoperative, and productive of no such consequence, because, being against common right, it is less favored, and accounted less worthy: *Vide* note to *Bradbury v. Wright*, Doug. 605. There was in that case, therefore, a rent service and not a rent charge; a conviction of which, brought me to concur in the judgment. I take it a rent charge can be created in Pennsylvania, only by granting an annual sum out of land charged with a clause of distress; which is the rent charge of the common law.

In the case at bar, not only is the rent fee farm, but the suspension of a part of it has been induced by an act of the law. The bill charges that a part of the premises has been taken for public use, by the opening of a street, pursuant to an order of the quarter sessions, and that compensation for it has been awarded respectively, to the landlord and the tenant; but as it is conceded that the residue of the ground would be sufficient for the entire rent, a doubt has been suggested whether the tenant ought not to take the landlord's compensation, and suffer him to distrain for the whole. More than a doubt of it was

1. 1 Whart. 837.

certainly entertained in *Jew v. Thirkwell*, Cas. in Ch. 31, where the chancellor refused to apportion, because the land was still worth more than the rent, notwithstanding a recovery of common in it, which was the foundation of the bill; yet on principles of general equity, there is no apparent reason why a common loss should be borne by the tenant alone. Even the common law, which for part eviction suspends a proportionate part of the rent without regard to the capacity of the residue to bear the whole, deals with the subject more equitably, by proportioning the rent to the enjoyment, which is the consideration of it. That case, however, seems to be distinguishable from the present. There, as profits still continued to be drawn from every part of the land, the rent might continue to issue from every part of it; but might it, in contemplation of equity, do so here? As we determined in *Warner v. Caulk*, 3 Whart. 193, and as all the old books have it, rent is an incident of the enjoyment; but there can be no private enjoyment of ground taken for a public street, though the right to the soil be not divested, and the occupancy of the public might therefore be considered an equitable disseisin. Still the difference betwixt it and a recovery of common, is only in the degree; and I am unable to discover a ground on which *Jew v. Thirkwell* could be sustained. In proportion as the enjoyment is curtailed without the tenant's default, so is the rent to be; and as by the contract, which could be remodeled only by common consent, every part of the rent is to issue out of every part of the ground, the landlord could not concentrate the whole of it in a particular part; and how can we treat the subject as if he might? It may be said that as the tenant would get the whole compensation, it would be more equitable to charge the residue of the enjoyment with the entire rent, than it was in *Jew v. Thirkwell*, where he bore the loss and got nothing. By the contract, however, the consideration of the rent is not to be money, but land, for which the tenant is not bound to accept an equivalent. Besides, on what principle he could be compelled to receive compensation awarded to another, and that too as a consideration for granting a new estate of the same nature, I can not imagine. All the authorities from the 46 Ed. III., 32, to the most modern, agree that a rent extinguished in part of the land, can be thrown entire on the residue only by what is in substance a fresh grant; and we can not treat the complaint as if it might be exacted.

That the present is a case for relief here, is irrefragable.

Equitable jurisdiction of apportionment springs from defectiveness, or want of a remedy at law; and I take it, the case at bar is in the latter category. An easement gained by the public, leaves the legal seisin undisturbed; consequently, where there is a court of chancery, apportionment for it can not be made in replevin, unless perhaps where the demise is by parol. Failure of consideration under a reservation by deed, was relieved against by a common law court, in *Fairman v. Fluck*, 5 Watts, 516, and *Warner v. Caulk*,¹ only because there was no separate forum of equitable administration from which relief might be had. Even in *Jew v. Thirkwell*, it would have been given in equity for want of eviction to make a case at law, had not the chancellor believed it to be unattainable anywhere. That case, so far as regards jurisdiction—and that was not contested—is in principle the present; for the title to land over which there is a highway, remains in the original owner as strictly as it does when a right of common in it has been recovered; and if there be no eviction to work a suspension at law, it is certain that, as there is no equitable plea to an avowry, the tenant can not have remedy for an equitable eviction by replevin. But an action at law, were it maintainable, would be fraught with those difficulties from multiplicity of interests, which first gave equitable jurisdiction in contribution; and these can be avoided only by calling in all the parties and making apportionment in a single suit so as to bind them all. But the proportions are to be settled by a jury.

The following decree was made:

February 17, 1838. This cause having been heard on the bill and answer, it is ordered and decreed, that the complainants are entitled to have an apportionment made of the ground rent mentioned in the said bill, according to the prayer of the said bill, and that so much thereof ought to be extinguished as shall be in just proportion to that part of the lot of ground therein mentioned which is taken for public use by the opening of Lombard street; and it is ordered, that the parties do proceed to a trial at law at the next *nisi prius*, to be held for the city and county of Philadelphia, upon the following issue, viz.: How much of the ground rent of one hundred and six dollars and sixty-six cents per annum, mentioned in the said bill and answer, has been discharged by the opening of Lombard street, and what proportion of the same ought to remain and be charged upon that part of the original lot which will remain

1. 3 Whart. 193.

after the opening of Lombard street. And the complainant here is to be plaintiff at law, and the parties are forthwith to prepare the pleadings, and the cause is to be put on the trial list of the second period; and it is hereby referred to James S. Smith, esquire, as master, to settle the said issue, in case the parties differ about the same. And it is further ordered, that all books, papers, and writings in the custody or power of any of the parties, relating to the matters in question, that shall be called for by the other party, be produced at the trial: and the court reserves the consideration of costs and of all further directions until after the said trial shall be had, etc.

Cited in *Reed v. Ward*, 22 Pa. St. 150, to the effect that where parties can not agree, an apportionment is to be made by a jury according to the value and not the quantity of the respective parts. So in *Dyer v. Wightman*, 66 Id. 429, the ruling in the principal case that a ground rent was in equity apportioned by the opening of a street through the demised premises, and that the rent was reduced in proportion to the amount of the lot taken for public use, was approved. Cited also in *O'Connor v. O'Connor*, 2 Grant Cas., 245, and held not to be inconsistent with the decision in that case. In *Workman v. Mifflin*, 30 Pa. St. (6 Casey) 371, the principal case was thus referred to: "That case is authority for all that was decided in it. It is, however, an unwarrantable deduction from it, that a ground rent is apportioned by opening a street through the land out of which the rent issues. It is impossible to read the case without the conviction that it was a mode selected by the parties in which to effect an amicable arrangement. Nor was its object so much apportionment as substitution of money for the land out of which the rent had been reserved. The tenant appealed to this court as a court of equity, admitted that damages had been awarded to her for opening the street; that a part of them had been awarded on account of her liability to the ground rent, offered to pay off the principal of the rent, the just proportion of the ground occupied by the street, and prayed that on payment it might be decreed extinguished, and the landlords be enjoined against proceeding to recover it. Chief Justice Gibson, in delivering the opinion of the court, admits that the law furnished no ground for relief, but asserts that equity might, under the circumstances, decree the substitution. It was not supposed then, as now, that apportionment or substitution might be effected in an action of covenant, or anywhere or in any mode, without payment of the entire principal of the ground rent. Payment of the whole principal was regarded as the foundation of the tenant's equity; payment of the damages assessed, or out of other property of the tenant. The case is, therefore, no authority for the doctrine that appropriation of the ground by the public for a highway, without more, without payment of the entire principal, extinguishes the rent." See also *Mifflin v. Workman*, 2 Phila. 355.

APPORTIONMENT.—As remarked by Lord Coke, the word apportionment "cometh of the word *portio quasi partio*, which signifieth a part of the whole, and apportion signifieth a division of a rent, common, etc., or a making of it into parts:" Co. Lit. 147 b. In the note to the case of *Ex parte Smyth*, 1 Swanst. 338, the reporter considers this definition, as given by Lord Coke, incomplete. He says that "apportionment denotes, not division, but distri-

bution; and in its ordinary technical sense, the distribution of one subject in proportion to another previously distributed." The accuracy of the latter definition is questioned in Story's Equity Jurisprudence, vol. 1 (12th ed.), sec. 475a, note 1, where it is said that "apportionment does not refer to a distribution of one subject in proportion to another, 'previously distributed,' but a distribution of a claim or charge among persons having different interests or shares, in proportion to their interests or shares in the subject-matter to which it attaches." Whether any or all of these definitions are inaccurate, it is unnecessary now to determine, but suffice it to say, that in its common acceptation, by this term is generally understood the division of a fund, or property, or other subject-matter, in shares proportioned to different demands or rival claims: Abb. L. Dict., *vide* Apportionment. Or, to be brief, it is sometimes used to denote the distribution of a common fund or entire subject among all of those who have a title to a portion of it: *Ex parte Smyth*, 1 Swanst. 338, 339, note. In a much more general, but an analogous sense, it is used to designate the contribution which is to be made by different persons, having distinct rights, towards the discharge of a common burden or charge, to be borne by all of them: 1 Story's Eq. Jur. (12th ed.), sec. 470. In the latter sense, this subject has been several times considered in this series. In *Nailer v. Stanley*, 13 Am. Dec. 695, note, contribution among holders of incumbered lands is considered at length. Also in *Henderson v. McDuffee*, 20 Id. 559, note, contribution among joint principals, one being insolvent, is discussed. And in *Morrison v. Beckwith*, 16 Id. 141, note, contribution among persons holding lands affected by mortgage, and the circumstances that must exist before such contribution can be enforced, is considered. Also in *Harrison v. Lane*, 27 Id. 612, note, contribution between co-sureties is reviewed. It is here proposed briefly to treat of the application of the subject of apportionment to contracts in general, leaving its application specially to rents, commons, and the like, to be considered at some future time; and to show to what extent, if at all, a contract that is entire may, in an action upon it, be apportioned.

APPORTIONMENT OF CONTRACTS, as applied to contracts in general, consists in the allowance upon a partial performance, of a proportionate part of what the party would have received as a recompense for entire performance: Abb. L. Dict., title Apportionment. A familiar and well-settled principle of the common law is, that an entire contract can not be apportioned: 2 Par. on Con., 6th ed., 520; 1 Story Eq. Jur., 12th ed., sec. 470; 2 Chit. Con., 11th Am. ed., 1080. The reasons generally advanced in support of this rule are, that inasmuch as a contract which is entire, is founded upon a consideration depending upon the entire performance of an act, when from any cause it is not wholly performed, the *casus foederis* does not arise, and the law will not make provisions for exigencies which the parties have neglected themselves. Courts of justice can only carry into effect such contracts as parties have made. They can not make contracts for them, or alter or vary those made by them. Thus says the reporter in the note to *Ex parte Smyth*, 1 Swanst. 338: "In its familiar practical applications, the principle that an entire contract can not be apportioned, seems founded on reasoning of this nature: that the subject of the contract being a complex event constituted by the performance of various acts, the imperfect completion of the event, by the performance of some only of those acts (as service during a portion of the specified period, navigation to an extent less than the voyage undertaken), can not, by virtue of that contract, of which it is not the subject, afford a title to the whole, or to any part, of the stipulated benefit." Similar reasons are

advanced by Story: "That as the contract is founded upon a consideration dependent upon the entire performance of the act, and if from any cause it is not wholly performed, the *casus fœderis* does not arise, and the law will not make provisions for exigencies which the parties have neglected to provide for themselves:" 1 Story Eq. Jur., 12th ed., sec. 470.

In such cases, whether the non-performance has arisen from the design or negligence of the party bound to perform the contract, or from inevitable casualty or accident, is wholly immaterial to the rights of the other party. The contract in each case being entire, and not having been completely executed, cannot be apportioned: *Paradine v. Jane*, Al. 26; Story on Bail., sec. 36; 1 Story Eq. Jur. (12th ed.) sec. 470. Thus where a person was appointed to receive rents at a salary of one hundred pounds per annum, and he died at the end of three quarters of the year, while in the service; it was held that his executor could not recover seventy-five pounds for the three quarters' service upon the ground that the contract was entire and could not be apportioned: *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; S. C., 3 Mod. 153. So where the mate of a ship engaged for a voyage at thirty guineas, and died during the voyage, it was held, that at law there could be no apportionment of the wages: *Cutler v. Powell*, 6 T. R. 320. So where seamen entered into articles to serve for monthly wages on board a ship bound for Madeira, etc., and to return to London, and agreed that they should not be entitled to any wages until the arrival of the ship at London, it was held, that although the ship earned freight on her outward voyage, yet, that being lost on her passage home, the seamen could not recover wages *pro rata* upon the outward voyage: *Appleby v. Dods*, 8 East, 300. So where a plaintiff contracted to furnish and put up on defendant's premises at L., a completed machine of a specified kind, "all ready to make gas;" and defendant agreed to pay freight on the machine from New York, to furnish tank and house and to pay fifteen hundred dollars when the works were on the ground; and plaintiff shipped the castings and materials for the machine, which defendant received and paid freight thereon, but then refused to allow plaintiff to put up the machine, it was held that the contract was entire, and that the contract price was not divisible, and that no recovery could be had for any portion of it: *Butler v. Butler*, 77 N. Y. 472. So where one, for a stipulated price, undertakes to find a purchaser for a farm, he is not entitled to anything unless he finds a purchaser willing to buy the whole farm: *Weber v. Clark*, 24 Minn. 354. Cases of this kind are very numerous. A few only need be cited: *Jesse v. Roy*, 1 Crompt. M. & R. 316; *Ex parte Smyth*, 1 Swanst. 338, and cases cited in note; 1 Story Eq. Jur. (12th ed.), secs. 101, 102, 103, 104, 470, 471, 471a; *Hartley v. Decker*, 89 Pa. St. 470; *Tarbox v. Hartenstein*, 4 Baxter (Tenn.) 78; *Rockwell v. Newton*, 44 Conn. 333; *Schekund v. Erpelding*, 6 Or. 258.

In some cases it has been held, that where, in a contract of service, the person performing the service dies before the time expires, the contract may be apportioned. Thus, where a slave was hired for a year and died before the expiration thereof, it was decided that the hirer was entitled to a corresponding abatement of the hire: *George v. Elliott*, 2 Hen. & M. 5; *Townsend v. Hill*, 18 Tex. 422. Decisions of this kind seem to be founded upon the principle that a person is not compelled to perform his contract when prevented from doing so by the act of God, and that when from such cause the full performance of an entire contract is prevented, it may be apportioned. Such decisions, however, interpolate into the contract of the parties' conditions which they did not insert, and which, if they had desired to be released upon the happening of, they would, no doubt, have provided for. The better reasoning seems to be with those cases holding a different doctrine: *Lennard v.*

Boynston, 11 Ga. 109; 2 Smith Lead. Cas. 44; note to *Cutler v. Powell*, 6 T. R. 320, and cases there cited. Where, however, the fulfillment of a contract is prevented by the supreme power of the state, it may be apportioned: *Melville v. De Wolf*, 82 Eng. Com. L. 844. This common law rule of the non-apportionment of contracts that are entire is simply a rule of construction founded upon the intention of the parties, and not a rule of law controlling such intention: 2 Pars. on Con., 6th ed., 521. Consequently, parties may, by apt words, make contracts which shall be apportionable. No rule of law prevents them from doing so, provided they make their intention manifest. "Thus, if A. and B. make a contract, by virtue of which A. is to enter into the service of B., at the rate of ten dollars per month, and continue so long as it shall be agreeable to both parties, such contract is clearly apportionable; for neither the extent of the service nor the amount of the consideration is fixed by the contract, but only a certain relation and proportion between them. And contracts have been held apportionable in which the service to be performed was specified and fixed, but the consideration to be paid was left to be implied by law. But this can not be laid down as a general rule of law:" 2 Pars. on Con., 6th ed., 521.

In *Roberts v. Havelock*, 3 Barn. & Adol. 404, which was an action for work and materials, the plaintiff, a shipwright, had engaged to put a ship of the defendant into thorough repair. Before the repairs had been completed, the plaintiff demanded payment for what he had already done, and refused to complete the job without. The defendant refused payment, and thereupon the action was brought, and a verdict found for plaintiff which defendant moved to set aside, on the ground that the contract was still open. Lord Tenterden said: "I have no doubt that the plaintiff in this case was entitled to recover. In *Sinclair v. Bowles*, 9 Barn. & Cress. 92, the contract was to do a specific work for a specific sum. There is nothing in the present case amounting to a contract to do the whole repairs and make no demand till they were completed. The plaintiff was entitled to say that he would proceed no further with the repairs till he was paid what was already due." This case has been here referred to somewhat at length, not because of its being particularly illustrative of the subject under consideration, but principally for the purpose of giving the remarks of Mr. Smith in the note to *Cutler v. Powell*, 1 Smith Lead. Cas. 29, 30, in referring to *Roberts v. Havelock*, which it is conceived are particularly valuable in a discussion upon the present subject.

After having stated the case and quoted the remarks of Lord Tenterden, he says: "From these words it may be thought that his lordship's judgment proceeded on the ground, that the performance of the whole work is not to be considered a condition precedent to the payment of any part of the price, excepting when the sum to be paid and the work to be done are both specified (unless, of course, in case of special terms in the agreement expressly imposing such condition); and certainly good reasons may be alleged in favor of such a doctrine, for when the price to be paid is a specific sum, as in *Sinclair v. Bowles*, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in installments, contrary to the agreement, instead of in a round sum, as provided by the agreement: but where no price is specified, this difficulty does not arise, and perhaps the true and right presumption is, that the party intended to keep pace with the accrual of the benefit for which payment is to be made. But this, of course, can only be where the consideration is itself of an apportionable nature; for it is easy to put a case in which, though no price has been specified, yet the consideration is of so indivisible a

nature, that it would be absurd to say that one part should be paid for before the remainder; as where a painter agrees to draw A.'s likeness, it would be absurd to require A. to pay a ratable sum on account when half the face only had been finished: it is obvious that he has then received no benefits, and never will receive any, unless the likeness should be perfected. There are, however, cases, that, for instance, of *Roberts v. Havelock*, in which the consideration is in its nature apportionable, and there, if no entire sum had been agreed upon as the price of the entire benefit, it would not be unjust to presume that the intention of the contractors was, that the remuneration should keep pace with the consideration, and be recoverable *toties quoties* by action on a *quantum meruit*." See also, as further illustrating this rule, *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Sickles v. Pattison*, 14 Wend. 257; *Wade v. Haycock*, 25 Pa. St. 382; *Scott v. Kittanning Coal Co.*, 89 Id. 231; *Tenney v. Mulvaney*, 8 Or. 129.

APPORTIONMENT OF CONTRACTS BY COURTS OF EQUITY.—Courts of equity in the application of this doctrine of the common law have generally, but not universally, adopted the maxim, *æquitas sequitur legem*: 1 Story Eq. Jur., 12th ed., sec. 470. Where, however, equitable circumstances intervene, redress has often been granted: Id., sec. 472; *Hale v. Webb*, 2 Bro. Ch. 78; *Ex parte Sandby*, 1 Atk. 149; *Newton v. Rowse*, 1 Vern. 460; *Lockley v. Eldridge*, Finch, 124; *Soam v. Bowden*, Id. 396; *Hirst v. Tolson*, 13 Jur. 596. Thus, where a solicitor, to whom a clerk was articulated, died shortly after the expiration of the second year of the articles, equity decreed a return of a proportionate part of the premium of clerkship, upon a bill filed on behalf of the clerk: *Hirst v. Tolson*, *supra*. So, where an attorney, while he lay ill, received the sum of one hundred and twenty guineas for a clerk who was placed with him, and he died within three weeks afterwards, the court decreed a return of one hundred guineas, notwithstanding the articles provided, that in case of the attorney's death, sixty pounds only should be returned: *Newton v. Rowse*, 1 Vern. 460. The latter case was referred to in *Hale v. Webb*, 2 Bro. Ch. 80, by Lord Kenyon, as carrying the jurisdiction of courts of equity "as far as could be, by returning a larger sum than that agreed for;" and Story adds, "for it overturned the maxim, *modus et conventio vincunt legem*:" 1 Story Eq. Jur., 12th ed., sec. 472. So, where an apprentice had been discharged from service, in consequence of the misconduct of the master, it was decreed that the indentures of apprenticeship should be delivered up and a part of the apprentice fee paid back: *Lockley v. Eldridge*, Finch, 124. See *Soam v. Bowden*, Id. 396. The mere refusal of the master to allow his apprentice to work, although without excuse, is not sufficient for a court of equity to decree a cancellation of the articles of apprenticeship and a return of the premium or a part thereof: *Webb v. England*, 7 Jur. (N. S.) 153. In this case it was held, that the proper remedy in such a case was by an action at law for damages, and the court refused to follow the case of *Therman v. Abell*, cited as *Sherman v. Abell*, 2 Vern. 64, where it was held that a tradesman who turns away his apprentice for negligence and misdemeanor, would be decreed to "refund a part of the money he had with him;" but said that *Argles v. Heaseman*, 1 Atk. 518, was to be followed as a correct determination of the law. In the latter case it was held that a misuser of an apprentice is no foundation for coming into equity to restrain an action at law brought by the master against the apprentice's father for a breach of covenant in quitting the master's service, because if it appeared in the action at law that there had been a misuser, then there would be no breach of the bond shown. It may be well to remark, that although Lord

Hardwicke held that the plaintiff was not entitled to an injunction, yet the one granted was subsequently made perpetual upon the consent of the defendant.

APPORTIONMENT OF DIVIDENDS.—In *Ex parte Rutledge*, 14 Am. Dec. 696, it was held, that where a person who was entitled for life to dividends on certain bank stock, “to be paid half yearly as they shall be received from the bank,” died just before a semi-annual dividend was declared, such dividend should be apportioned and a part paid to his executor. This case was decided upon the authority of those cases which hold that wherever an interest is daily accruing it may be apportioned. Such was the case of *Banner v. Lowe*, 13 Ves. 135, where interest on a bond, accruing *de die in diem*, was decreed to be apportioned. So in *Hay v. Palmer*, 2 P. Wms. 503, a fund for maintenance was directed to be apportioned, “for it is for daily support.” Notwithstanding these reasons, the decision in *Ex parte Rutledge* is, as is stated in the note to that case, contrary to the generally accepted rule. All text-writers, as far as our examination extends, lay down the general rule, “that a holder of stock has a right to receive all dividends declared, and it makes no difference when they are earned.” Ang. & Ames on Corp. (10th ed), sec. 557, note a. To the same effect is Field on Corporations, sec. 104. The difficulty of ascertaining the time when the earnings of a corporation were made, and that they are variable of necessity, are expressly stated as the grounds on which the courts in many instances have declared that dividends are not apportionable: *Ex parte Rutledge*, 14 Am. Dec. 697, note, and cases there cited. See also *Gifford v. Thompson*, 115 Mass. 478; *McKeen’s appeal*, 42 Pa. St. 479.

MACKINLEY v. MCGREGOR. MACKINLEY v. HEWITT.

[3 WHARTON, 369.]

HUSBAND AND WIFE, BY THE CIVIL LAW, are for most purposes treated as separate distinct persons, entitled to sue and to contract with one another.

HUSBAND AND WIFE, BY THE COMMON LAW, are treated as one for most purposes, and the husband as being that one.

MARRIED WOMAN CAN NOT CONTRACT so as to render herself personally liable.

MARRIED WOMAN MAY, AS AGENT OF HER HUSBAND, make him responsible on contracts, if the circumstances are such as to show his assent, express or implied.

HUSBAND, BY NOT RETURNING GOODS ORDERED BY WIFE, may adopt her purchase of them, even when living separate from her.

HUSBAND MUST DISSENT FROM WIFE’S CONTRACT, if known to him, in order to avoid responsibility for it.

CREDIT BEING GIVEN TO THE WIFE ALONE, the husband is not liable.

PURCHASE MADE TO DEFRAUD THE VENDOR by selling them for a less price and without paying for them, may be treated as void by him, and he may reclaim the goods; but he must promptly disavow the contract after having notice of the fraud.

EVIDENCE TO SHOW FRAUDULENT PURCHASE.—The sudden expansion of business, the accumulation of goods beyond the ordinary amount, the immediate sale of some of them at a reduced price, and their repurchase, and the refusal to pay for goods under pretense that they were bought

by the debtor's wife, all tend to show a preconceived design to defraud. The transactions and declarations of the wife in making the several purchases are also admissible.

VENDOR MAY ELECT TO CONSIDER CONTRACT AT AN END if vendee disavows all property in the goods and refuses to pay for them.

HUSBAND IS LIABLE FOR TORTS OF WIFE, and an action may be sustained against him to recover goods of which she holds possession.

PLEA OF NON CEPIT IN REPLEVIN admits property in plaintiff, and takes issue on the caption and detention only.

WITNESSES.—If several have agreed in the event of recovery to share the proceeds, neither is competent as a witness.

CROSS-EXAMINATION OF WITNESSES can not be made available by a party to prove an affirmative before he has opened his case.

DEMURRER TO EVIDENCE admits every fact which the jury might properly infer from the evidence.

WRITS of error to the district court for the city and county of Philadelphia. In the first case, Edward Mackinley, plaintiff in error, was defendant below, and Robert McGregor, defendant in error, plaintiff below. The action was replevin. The sheriff's return was eloigned. Defendant pleaded: 1. *Non cepit*; 2. Property in Mary Mackinley. Issue was joined on the first plea; and to the other, plaintiff replied that Mary was, at the taking and detention, the wife of defendant. This plea was subsequently withdrawn and the case tried on the issue of *non cepit*. The evidence showed that in the summer of 1834, the defendant married Mary Snyder, who had been for some years engaged in the corsetmaking and retail haberdashery business. After their marriage the business was carried on in the married name of Mary Mackinley. The defendant and his wife lived together in the same building in which she had her store, and the stock on hand at their marriage was worth about twenty thousand dollars. Shortly after the marriage Mary, whose credit was excellent, purchased a large amount of goods on credit, and in the autumn of 1835 she had a stock on hand of the value at cost of seventy-eight thousand dollars, and was indebted in different amounts exceeding ninety thousand dollars. The defendant was aware of the general character of his wife's dealings, and had never interfered to prohibit them; but on the contrary, had negatively countenanced them. The debts remaining unpaid, both Mary and her husband were applied to for payment, when the former denied her liability because she was a married woman, and he denied that he ever was liable. The creditors thereupon brought suits against the wife, and others against the defendant, on promissory notes given by her for the goods sold, and also for goods sold and delivered. These

actions were commenced in the district court of Philadelphia, and from proceedings had therein, and from affidavits of defense filed, it appeared that the defendant disclaimed all participation in his wife's business, and all liability on her contracts.

About the time these suits were commenced, the creditors discovered that a portion of the goods that had been sold to Mary were stored away in a building back of her store, and thereupon they brought actions of replevin to recover such goods, on the ground of a disaffirmance of the sales. The present action was of this kind. Plaintiff sought to avoid the sales for three reasons: 1. Because the defendant had disclaimed the existence of any contract for the purchase of the goods and had thereby disclaimed the only ground on which the property could have vested in himself; his wife, a married woman, being incapable of acquiring property otherwise than for him. 2. That the plea of *non cepit* was a disclaimer of the property in the defendant and an admission that it was in plaintiff. 3. That the defendant's wife had been guilty of fraud in obtaining possession of the goods under the fiction of a purchase, as her husband's agent, for the purpose of a business which she was carrying on with his sanction, when the real object of the purchases was an accumulation of goods for secret purposes, without any intention of paying for them. At the time of her marriage Mrs. Mackinley was the owner of certain real and personal property, all of which was settled before her marriage in trust for her separate use. Some of the liens on this property were paid off with funds raised upon the credit of the business carried on in her name. To prove fraud, the plaintiff also introduced evidence showing that the defendant's wife had purchased other goods on credit in New York and had allowed them to be sold at a great sacrifice. Also that when the sheriff came to execute the writs of replevin, Mrs. Mackinley and others in her employ had concealed some of the goods and cut off the private marks, in order to prevent the sheriff from finding the goods mentioned in the respective writs. On September 14, 1835, the plaintiff and a large number of the other creditors of the defendant's wife entered into an agreement, by which the affairs of Mary Mackinley were to be investigated and such legal proceedings as were thought best taken. On the eighth of October, 1835, plaintiff entered into another agreement with a number of the creditors by which all replevins and other processes that had been issued were to be for the common benefit of all who signed the agreement of September 14. Certain persons who

signed the two agreements just mentioned were called as witnesses and objected to as incompetent, and thereupon they executed mutual releases with plaintiff, but the costs were not paid into court; and thereupon the court admitted them as witnesses against defendant's objection. E. E. Mitchell, one of the firm of A. T. Stewart & Co. of New York, testified, against defendant's objection, that a quantity of black shawls, bought of them on credit by the defendant's wife, were sent to auction and sacrificed for cash, and afterwards repurchased by her for a higher price. The witness described the shawls, and plaintiff offered to prove that the tickets on them were sent to the house of the witness, who could identify them. The defendant objected to such proof, but the court admitted it. The witness then testified that "a ticket like tickets on the shawls which she had bought was returned to them in a letter; that the ticket was such an one as had been on the shawls sold at eleven dollars." He was then asked by whom was the ticket returned; which was objected to by defendant; and the judge permitted the witness to be asked by whom the letter purported to be signed and sent, and from what place, and defendant excepted.

The following errors assigned will be the only ones necessary to be stated, as they only were considered at length in the opinion: 1. In admitting as witnesses those persons who signed the agreements entered into September 14 and October 8, because, being interested in the action, they were incompetent. 2. That the judge admitted to be read in evidence the affidavit of Mrs. Mackinley, made in a certain action in the district court of Philadelphia. 3. That the judge refused to permit the defendant's counsel to ask Philip Kelly, a witness of the plaintiff, then under cross-examination, the following question: "From whom have you heard anything in relation to that offer, if an offer was made?" meaning an offer by Mrs. Mackinley to surrender all her goods to her creditors, namely, to the said witnesses and others; he having already proved he had heard such an offer. 4. That the judge admitted evidence by Edward E. Mitchell and John H. Obertieffer of transactions irrelevant to the issue; viz., of purchases of merchandise by defendant's wife of A. T. Stewart & Co., and of purchases at auction in Philadelphia. 5. That the judge admitted evidence by the said Edward E. Mitchell, of what Mrs. Mackinley said in defendant's absence, of a portion of the merchandise going to Edward Cunningham, and of his sending it to auction. 6. That the judge admitted evidence by the said Mitchell of his inferences from certain supposed tick-

ets or marks, as to certain black shawls being part of the said goods, and being sent to auction. 7. That the judge admitted the said Mitchell to prove the contents of a letter not in the defendant's keeping or possession—to say by whom the same purported to be signed and sent, and from what place. 8. That the court refused to permit the defendant to cross-examine the witness Mitchell, to show that the witnesses for plaintiff were actuated by a feeling of strong resentment against the defendant and his wife, and to show a combination by them against the latter. 9. That the judge refused to permit the defendant's counsel to cross-examine John Stokes, a witness of plaintiff, to prove that the auction sales given in evidence by the plaintiff of the goods bought by defendant's wife from Alexander Stewart & Co., was the only sale at auction by her; and that it was made under the pressure of a threatened execution, thus to repel the plaintiff's allegation of fraud, founded on that sale, and the general allegation of fraud.

The second case of Mackinley, plaintiff in error, against Hewitt, defendant in error, differed from the above in certain particulars, the only one necessary to state being, that when the persons who signed the agreements of September 14 and October 8 were offered as witnesses and admitted by the court, a sufficient sum of money to cover the costs was deposited in court. The defendant, upon the plaintiff closing his evidence in the last case, demurred thereto, and plaintiff joined in the demurrer, which was overruled, and judgment given for the plaintiff Hewitt.

C. Ingersoll and J. R. Ingersoll, for the plaintiff in error in both cases.

Holcomb and F. W. Hubbell. for the defendant in error McGregor.

F. W. Hubbell and Cadwalader, for the defendant in error Hewitt.

By Court, ROGERS, J. By the civil law, husband and wife are considered as persons capable of distinct and separate rights, and of making separate contracts, and they may even sue each other, as independent individuals; but by the common law they are looked upon as one person; the legal existence of the wife is, to all civil purposes, merged in that of her husband; and consequently, generally speaking, any contract made with her is absolutely void. How far a court of chancery could reach her, in

certain cases, in respect to her separate estate, does not enter into this controversy; and nothing we now say can be construed as having any bearing upon a point which may hereafter arise. But although a married woman is not personally liable on her contract, yet she may act, and frequently does act, as the agent of her husband, and in that capacity may charge him with the payment of goods, purchased by her, although she can not buy goods so as to charge him, without his assent, either express or implied. If goods come to the use of the husband, or to the use of his family, with his knowledge, he is chargeable; as if they are brought to his house, and used there. If the wife be allowed by the husband, as is generally the case, to be house-keeper, and to buy for him, or buy necessary apparel for herself, or necessaries for herself and family, or goods to carry on a trade conducted by her, during her cohabitation with her husband, his consent is presumed. In all such cases, the contract is with him, through the agency of the wife.

When the husband dissents from such acts of the wife, beforehand, no such presumption can arise; and, consequently, in such cases, he is not liable on contracts made with her. Even where a man and wife are living apart, if the husband has any control over goods, improvidently ordered by his wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause them to be returned, he adopts her act, and renders himself responsible. Nor can a husband and wife, by any private understanding or agreement between them, of which others are ignorant, change their legal capacities and characters. It follows from these principles, which are supported by reason, as well as by the authorities that have been cited at the bar, that if the husband assents, or knowing of the contracts of the wife, does not expressly dissent, he is chargeable with her agreement; or if a contract be made by the wife, of which he is afterwards informed, and he acquiesces in it, by using the goods, and treating them as his own, he can not avoid the legal responsibility which the law throws upon him. Where the husband is cognizant of the contract, the legal liability is incurred; and if he wishes to avoid responsibility, it is his duty expressly to dissent; and if the goods come into his possession, with a knowledge of the contract, to take the earliest opportunity to return them to the vendor. It is very clear from the evidence, that Edward Mackinley was perfectly acquainted with the course of dealing with his wife, before, at the time, and after the several contracts made with her. His con-

sent will therefore be presumed; and he can only avoid his legal responsibility, by an express disavowal of her acts, before, at the time, or after the contracts made, or by an immediate return of the goods to the vendor. But it is contended, that where credit is given to the wife, the husband is not liable, although the wife lives with her husband, and he sees her in the possession of the goods. For this position, the plaintiff in error relies on *Manby v. Scott*, 1 Mod. 138; *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22, and *Montague v. Benedict*, 3 Barn. & Cress. 631. In delivering the judgment of the court in *Manby v. Scott*, Chief Justice Hale says: "If a man takes my wife and clothes her, this amounts unto a gift of the apparel unto her: 11 Hen. IV., 83. And I may take my wife, with the apparel, and no action lies against me. By the same reason, when a man delivers stuff, or other wares, to my wife, knowing her to be a *feme-covert*, to make apparel, without my privity or allowance, this shall be construed to be a gift of the stuff unto her, and I shall not be charged in an action for it."

In *Bentley v. Griffin*, the question was, whether the general liability of the husband was not repelled by the circumstances which showed that the credit was given to the wife. The wife purchased some fashionable dresses, unsuited to her condition in life; and the only fact, from which a knowledge of the sale could be brought home to him, was that some of the articles furnished by the plaintiff, were worn by her in the presence of her husband. But to rebut the fact of knowledge by the husband, and his consequent acquiescence, circumstances were shown which rendered it clear to the mind of the court, that the plaintiff gave credit to the wife alone, without any idea that recourse should be had to the husband. The bills drawn on her, with a full knowledge that she was a *feme-covert*, were accepted and paid by her. She also gave directions to the servant, when the articles were brought home, to put them away so that her husband might not see them. It is difficult to resist the conclusion, that the tradesman and wife were well aware of their relative situations, and that he was willing to take the chance of payment by her. *Stone v. McNair*, 7 T. B. 166,¹ is the case of a loan to the wife, without any authority of the husband, express or implied, for which the husband was held not to be liable. *Metcalf v. Shaw*, 3 Camp. 22, recognizes the general principle, that where credit is given to the wife, and not to the husband, he is not chargeable. Wearing apparel

1. Error. See *Stone v. Macnair*, 7 Taunt. 432.

was supplied to a married woman, in quantities unsuitable to her husband's degree, and without his knowledge; for which the credit was given to her, and her promissory note was taken in payment. "The action clearly can not be maintained on the promissory note," says Lord Ellenborough, "as the wife had no authority, general or special, from her husband as his agent; and I think, he is not liable for any part of the goods, on this plain ground, that they were not supplied on his credit, and the plaintiff looked to the wife only for payment."

In *Montague v. Benedict*, it appeared that the plaintiff had, in the course of two months, furnished to the defendant's wife, jewelry to the amount of eighty-three pounds, and had always, when called on, avoided seeing the defendant; that goods to that amount were in no respect necessary to the defendant's station in life. It was held, that as there was no evidence of any assent of the husband to the contract made by his wife, an action for the price of the goods could not be maintained. In order to avoid the responsibility which the law throws upon the husband, there must be a want of knowledge of the transaction, an absence of assent, either express or implied, and moreover, the credit must be given to the wife, and not the husband. And this unquestionably is the amount of the cases which have been cited. With this qualification, I fully subscribe to the soundness of the principles stated. They are necessary to protect husbands from the folly or fraud of tradesmen on the one hand, and the improvidence of wives on the other; but this principle can not apply, where the contract is made with his knowledge and assent. Where he assents beforehand, or knows of it, and does not expressly forbid it, or either uses the articles himself, or permits his family to use them, it would be a gross fraud to attempt to shield himself from payment. Whether the credit is given to the wife, is a question of fact for the consideration of the jury; but I can not believe, that where a husband is well acquainted with the course of dealing in which his wife is engaged, when he does not forbid it, nor take any steps to put others on their guard, these cases can be made to apply. Mrs. Mackinley denies her liability, because she is a *feme-covert*; and Edward Mackinley, because he did not make the contract; but the plain answer to this subterfuge, for I can view it in no other light, is, that it is the contract of the husband through the agency of the wife. His consent is presumed, and the presumption can only be rebutted by an express prohibition on the part of the husband. The fact that

the contract was made by the wife, and that she is charged with the goods, is, under the circumstances, of but little weight. It affects the form, but not the substance of the contract. It by no means of itself discharges him from liability, which is the legal consequence of his assent to her acts. If a man obstinately and perversely furnishes a wife with articles, unsuitable to her condition in life, in opposition to the known will of her husband, this is a gift to her; and this principle is asserted in *Manby v. Scott*, and in the other cases cited. When it assumes the form of a contract, it creates a moral obligation; but the policy of our law forbids that it should be treated as a legal obligation, affecting the liability of the husband or wife. Such, we think, are the principles which must govern in an action on the contract of sale. But this is an action of replevin which disaffirms the contract.

The plaintiff contends that the suit can be maintained on three grounds: 1. That the property has never been changed, the goods having been obtained under such circumstances of fraud as vitiated the sale. 2. Because the parties rescinded the contract. 3. Because, by the plea of *non cepit*, the property is admitted to be in the plaintiff.

It would be a dangerous doctrine to establish, that where a person purchases commodities which, at the time, he is conscious he shall be unable to pay for, though these goods may have afterwards passed through other hands, in the fair way of purchase, or third persons may have become, in the regular course of business, interested in them, the original seller shall have the right to recover them, in whomsoever's hands they may be. But whatever may be the limitation of the right of the vendor, it is certain, as a general principle, that when a person purchases goods, with a preconceived design of not paying for them, it is a fraud, and the property in the goods does not pass to the vendee. Replevin, or trover, will lie by the vendor against the vendee, although not against a *bona fide* purchaser without notice of the fraud. It is a question of fact, whether the vendor has made an improvident sale, or the defendant has fraudulently obtained the possession of the goods. If the jury believe the defendant formed a deliberate plan to obtain the goods, intending that they never should be paid for, with a preconceived resolution to embezzle the money, or to become insolvent, or to pass them over to a favored creditor, the defendant has been guilty of fraud, and the property in the goods does not pass. It is alleged, that the defendant did not

buy the goods in the regular course of trade, but that he bought them for the fraudulent purpose of having them resold at a less price. If this was the intention of the vendee, and this purchase was the result of a general plan to defraud, the vendor may reclaim his goods, whatever appearance of fairness may attend the particular transaction of sale itself. What act of affirmance of the contract by the vendor may preclude him from asserting a right to the specific articles sold, it is not necessary to determine; that right, however, may be maintained at any distance of time after the sale, where the fraud has been concealed, provided third persons may not have acquired an interest in the goods. But although the lapse of time will not of itself, without more, prevent the vendor from reasserting his right to the property sold, yet he should be prompt in disavowing the contract, after coming to a knowledge of the fraudulent conduct of the vendee. He must do no act in affirmance of the contract, particularly when others may have credited the vendee, on the faith that he was the owner of the goods, or when the vendee has committed a notorious act of insolvency. That there should be some limit, on the ground of policy, to the power of the vendor, in this respect, is plain, but the difficulty is to lay down any precise and definite rule. Each case must depend on its own circumstances: but in coming to a conclusion that fraud exists, in a particular case, the jury should be careful of the weight to be attached to transactions long subsequent in point of date.

To show fraud in the defendant and his wife, the evidence referred to in the second, fifth, sixth, and twelfth exceptions, was properly received. There was some evidence, namely, the articles of agreement between Mackinley and wife, which were concealed, the sudden expansion of business, and accumulation of goods, much beyond the wants of her ordinary and legitimate business, the immediate sale of some of the goods at a reduced price, and their repurchase, and the refusal to pay for goods, under the pretenses stated, which tended to show a systematic plan and combination between Mackinley and wife to purchase goods, among which this parcel was one, with the fraudulent preconceived design of not paying for them. For this purpose, all the transactions of Mrs. Mackinley, and her declarations, in connection with the business in which she was engaged, as the agent of her husband, were properly admitted in evidence. It is true, that a disposition to cheat one person, can not be called in to aid evidence of fraud in a sub-

sequent, or prior and distinct transaction. But when it is one of a series of acts, although with distinct and different persons, it may be received to prove a general combination, or preconcerted plan, to cheat and defraud, of which the one in controversy may be the result. The evidence was properly admitted, to show a general design in these parties to obtain the possession and control of a large amount of goods, under the false cover and pretense of a regular business, whereas the real, but concealed intention was, to dispose of them in a clandestine manner, with a view of converting them into cash, and by this means eluding the just claims of creditors.

Second point. That the defendant has disclaimed the contract. And this is a question for the jury; for if the defendant has disavowed all property in the goods, the vendor may reclaim them and recover the specific articles, or their value, in this action. From the return of the contract of sale, it is obvious, that when once entered into, it can not be rescinded by either of the contracting parties, without the consent of the other; but an agreement may be rescinded with the consent of both. When the vendee disavows all property in the goods, and refuses to pay for them, the vendor may elect to consider the contract at an end. If the defendant disavows the contract, and disavows all property in the goods, the vendor may elect, either to proceed on the contract of sale, or by action of replevin, which disaffirms the contract. The possession of Mrs. Mackinley is, under the circumstances of this case, his possession; and it matters not whether he or she, or both of them, refuse to return the goods to the owner; in either case he is liable for their detention. Husband and wife are so identified, that he is liable, as well for her torts or frauds, as for contracts made by her as his agent. When the sheriff returns that the goods are eloigned, the vendor may recover the value of the goods in this action. It may also be proper here to add, that we do not think, that because the creditors have brought actions on the contract, the plaintiff is thereby prevented from supporting an action of replevin. These actions are not brought on the same, but different contracts, and although the parties may be the same, yet the actions are not inconsistent.

But it is said, and this brings me to the consideration of the third point, that not only has the vendee disclaimed property in the goods, but that he has admitted on the record, that the property belongs to the plaintiff: and so unquestionably are the authorities, all of which have been collected by the industry of

the counsel, with the exception of a solitary dictum of Justice Burroughs, in *Clarke v. Davies*, 7 Taunt. 72. By the plea of *non cepit*, the caption and detention only are put in issue, and not the property which is admitted: Gilb. on Rep. 165, and the other authorities cited. The only point to which the evidence applies under that plea, is whether the defendant took the goods or not, or whether, if he came rightfully into possession, he has, and continues wrongfully to detain them. The plea of *non cepit*, as is said in *Wilkinson on Replevin*, has been improperly called the general issue in replevin, for it only puts in issue the caption and detention. In point of form, it denies the taking only, and is pleaded without any suggestion for a return, and, consequently, there can not be judgment for a return on that plea. But although it denies the taking only, yet on that plea, the unlawful detention may also be inquired into; and this has been the invariable and constant practice, not only in England, but in this state, from the first settlement of the province. In England, the action of replevin has been generally confined to goods distrained for rent, but with us it has been used in all cases, where chattels in the possession of one person have been claimed by another. Where the defendant wishes to put the right of property in issue, it is done by a plea of property, which throws the burden of proof upon the plaintiff in replevin, to prove property in himself. And this was the opinion of Justice Kennedy, in *Marsh v. Pier*, 4 Rawle, 283 [26 Am. Dec. 131], with which, for the reasons there stated, we fully concur: *Clemm v. Davidson*, 5 Bro. 399; 6 Har. & J. 471.¹

For the reason stated in a preceding part of this opinion, we think that the affidavit of Mrs. Mackinley, which forms the third specification of error, was correctly admitted, nor do we see any thing exceptionable in the refusal of the permission to ask the question as contained in the fourth error.

The seventh and eighth errors were considered together. The object of the evidence which was admitted, was to show that the goods of one of the vendors, were sold at auction, at an under-value, and this was one of the means of identifying the goods. But this was not the best evidence, for Mr. Fassit, by whom the letter was written, should have been examined, and from him, or in some other way, it should have been ascertained, whether the ticket which was inclosed in the letter by him to the vendor, was attached to the goods sold at auction.

1. *Cullum v. Bevans*.

The ninth and eleventh errors are intended to question the decision of the court in *Ellmaker v. Buckley*, 16 Serg. & R. 72. We have examined the judgment of the court, as delivered by Chief Justice Gibson, and see no reason to doubt the soundness of the principle asserted by him, in relation to the order of the examination of witnesses. We therefore see no error in this part of the case, even if such an exception was the subject of review in error.

I have carefully examined the remaining errors, and with the exception of the first error, we are of the opinion they have not been sustained. The first error is that the judge admitted as witnesses severally, Peter W. Wiltbank and others; those individuals being interested in the action, and therefore incompetent to testify.

By the agreement of the fourteenth of September, 1835, the creditors of Mary Mackinley bound themselves to each other, to take such lawful measures as may be necessary to investigate her pecuniary affairs and transactions, and to discover and apply her property to the payment of her just debts, without preference or distinction. They also agreed to contribute in the ratio of their respective debts, to such expenses as may be necessary to carry the agreement into effect. At a subsequent meeting of the creditors of Edward Mackinley (and in this transaction his and her creditors are the same), it was resolved, as the sense of the meeting, that all replevins and other process which had been issued, were for the common benefit of those who had or might sign the agreement of the fourteenth of September, 1835.

The parties to these agreements, as is very clear, make common cause with each other. As they are entitled to all the benefits as equal participators in the amount recovered in the replevin, so they are liable to contribute to its expenses and costs; and a refusal to do so would be a gross fraud on the plaintiff on record. He could not discontinue the suit without their assent, nor could they refuse without breach of the agreement, to contribute to the expense of the suit, in the ratio of their respective debts. The fact that their names do not appear on the record is immaterial. In *Gallagher v. Milligan*, 3 Penn. 177, it was held, that any person who, at the time of the commencement of the suit, is entitled to a portion of the money sued for, is liable to costs; and is, therefore, incompetent to give evidence, although he may release his interest to the plaintiff on record. On the authority of this case, we are of the opinion

that the court erred in admitting the witness without payment of costs.

Judgment reversed, and a *venire de novo* awarded.

By Court, ROGERS, J. The point ruled in *Mackinley v. McGregor*, renders a minute investigation of this case wholly unnecessary. It would lead to a repetition of the principles there stated; for in all the essential features, the cases are the same. It is, however, an act of justice to acknowledge the aid we have derived from the industry and research of the counsel who argued this cause. This, unlike *Mackinley v. McGregor*, and in this only they differ, comes before us on a demurrer to evidence. "He who demurs to parol evidence," says Chief Justice Tilghman, in *Dickey v. The Administrators of Putman*, 3 Serg. & R. 416, "engages in an uphill business. Every point is taken *pro confesso*, which the jury might, with the least degree of propriety, have inferred from the evidence. The defendant admits every fact which the jury could have found upon the evidence." Now, whether the jury could have found fraud, is immaterial, as they could without doubt, have inferred with propriety, the several points on which the district court founded their judgment; and these we concur with them in thinking, and for the reasons given by Justice Jones, who delivered the opinion of the court, entitled the plaintiff to judgment on the demurrer.

Judgment affirmed.

GIBSON, C. J., did not sit.

Cited upon the following points: In *Davis v. Steiner*, 2 Harr. 277, that every fact is taken against the party demurring as true, and no testimony can be considered which impugns its truth. In *Hackman v. Flory*, 4 Id. 199, that where a husband and wife live together, any business in which she may be engaged is presumed to be conducted by her, with his knowledge and as his agent. In *Smith v. Smith*, 9 Id. 373, that a vendor can not, after a fraudulent purchase, pursue the goods into the hands of a *bona fide* purchaser from his vendee, or of one who has made advances or incurred liabilities on the faith of them. See also *Harner v. Fisher*, 58 Pa. St. 457; *Abbott v. Mackinley*, 2 Miles, 228; and *Gibbs v. Neely*, 7 Watts, 307, all citing the principal case, and distinguishing it from them.

MARRIED WOMEN, AGREEMENTS OF: See *Dorrance v. Scott*, ante, 509, and cases there cited.

JAMISON v. JAMISON.

[3 WHARTON, 457.]

CERTIFICATE OF A JUDGE OR JUSTICE, of the acknowledgment of a deed by a married woman, is to be judged solely by what appears on the face of the certificate.

PAROL EVIDENCE OF WHAT PASSES at the time an acknowledgment is taken and certified, is inadmissible, except in cases of fraud or imposition.

ALTHOUGH A MARRIED WOMAN is not named as a grantor in a mortgage, yet if it sufficiently appear from the instrument itself, coupled with the fact that she joined in its execution, that she intended to convey her interest, it will be sufficient for that purpose.

MORTGAGE OF THE WIFE'S REAL ESTATE, executed by husband and wife, to secure the debt of the former, and acknowledged by her in the manner required by law in respect to absolute conveyances, is sufficient to bind her estate.

CERTIFICATE OF ACKNOWLEDGMENT OF A DEED by a married woman, which states that, "she being of full age, separate and apart from her husband by me examined, declared that she did voluntarily, of her own free will and accord, seal and acknowledge the within indenture without coercion of her said husband, the contents being by me first made known to her," is sufficient.

A WRIT of *scire facias* issued out of the court of common pleas of Montgomery county, at the January term, 1834, at the suit of Robert Jamison against Syndonia Jamison, who survived Hugh Jamison, upon a mortgage dated January 31, 1827, executed by the said Robert Jamison and Syndonia Jamison. The facts necessary to an understanding of the points determined are sufficiently stated in the opinion. The acknowledgment to the mortgage sued on, was as follows: "Bucks county, ss. The thirty-first day of January, 1827, before me, the subscriber, a justice of the peace in and for the county of Bucks, came and appeared the within named Hugh Jamison and Syndonia, his wife, and acknowledged the within indenture of mortgage to be their and each of their act and deed, and desired that the same might be recorded as such according to law. The said Syndonia being of full age, separate and apart from her husband by me examined, declared that she did voluntarily, of her own free will and accord, seal and acknowledge the within indenture of mortgage without coercion of her said husband, the contents being by me first made known to her." Verdict for plaintiff.

Sterigere and Mallery, for the plaintiff in error.

Freedly and B. Tilghman, contra.

By COURT, SERGEANT, J. The first and third bills of excep-

tions, and a portion of the charge of the court, raise the question, whether the certificate of the justice of the peace of the acknowledgment by the husband and wife, was conclusive as to all matters legally contained in it, so that the defendant was not at liberty to prove by parol evidence, that the mortgage was not acknowledged by her before the justice, in the manner it purports to have been, and thus destroy its validity.

This point has not perhaps been expressly ruled, but the principle has been repeatedly recognized, that the certificate of the judge or justice, as to the acknowledgment of a deed by a married woman, is to be judged of solely by what appears on the face of the certificate itself; and that parol evidence of what passed at the time of such acknowledgment, is not to be received, except in cases of fraud and imposition. In *Watson v. Bailey*, 1 Binn. 470 [2 Am. Dec. 462], the acknowledgment being held to be defective, and not to pass the estate of the wife, the defendants offered to produce evidence of parol declarations by the wife, that she executed the deed voluntarily; and that if it was not sufficient, she would execute and acknowledge it over again, or do any other act to make the thing good. The evidence was held to be inadmissible. This case was recognized, and the same decision made, in *Jourdan v. Jourdan*, 9 Serg. & R. 268. "There would be no certainty in titles," says Tilghman, C. J., "if that kind of evidence were permitted. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else." And again, in *Barnet v. Barnet*, 15 Id. 73 [16 Am. Dec. 516], he says: "The third error assigned, is in the rejection of parol evidence offered by the defendant, to prove that when the demandant made her acknowledgment, she knew the contents of the deed, and received eight dollars from F. Barnet for executing the deed. That such evidence was inadmissible, was decided by this court in the case of *Watson v. Bailey* [2 Am. Dec. 462]. There may be cases of gross fraud, in which parol evidence would be received, unless the land had passed into the hands of a purchaser for valuable consideration, without notice of the fraud."

These decisions all show that the defendant is not permitted to prove by parol evidence, that the magistrate's certificate does not contain the whole truth, even when the object of such evidence is to support the deed. I can see no distinction between these cases, and that in which the defendant endeavors to show by parol evidence, that the certificate of the magistrate

contains what is not the truth, and thus falsify it, for the purpose of destroying the deed. The judge or justice of the peace in taking an acknowledgment acts judicially, not ministerially. The law imposes on him the duty of ascertaining by his own view and examination, the truth of the matters to which he is to certify, and points out precisely his duty. Having thus intrusted him to see that the proper forms are observed, his solemn certificate that they have been observed, on the faith of which parties act, contracts are proceeded in, moneys are paid, and deeds accepted, must (in the absence of fraud or collusion), be considered as entitled to full faith and credit; and can not, without rendering titles to real estate exceedingly insecure, be left at any distance of time afterwards, to the uncertainty and frailty of parol proof, and to all the mistakes, prejudices, imperfections, and hazards that attend it. For these reasons, I am of opinion, that the court below was right in refusing to permit the plaintiff to produce parol evidence to controvert the magistrate's certificate, and in charging the jury that it was conclusive evidence that the defendant acknowledged the mortgage as required by law.

2. The mortgage is objected to, first, because the wife did not grant her estate; and, secondly, it is said that she was not a party to the indenture of mortgage, and, therefore, could convey nothing by it. The indenture is certainly informal in the premises, so far as respects the wife, in not making her one of the grantors in the indenture, in the manner usually practiced. But the omission of all or any of the formal parts of a deed, does not destroy its validity, where sufficient appears on its face to show, that those having an interest intend to convey it, and they join in sealing the instrument. The office of the premises in a deed, is, rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. The office of the *habendum* is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. But the deed that does usually consist of all these parts, may be good notwithstanding some of them be omitted, and if it be not so formally made; for an estate may be made by a deed without any *habendum* at all: and if the name of the grantee be not contained in the premises, yet if it be in the *habendum*, it may be good enough: Shep. Touch. 73. In the present instance, Mrs. Jamison joined in this instrument by executing and acknowledging it; and though she is not named in the premises, yet the premises de-

scribe the whole land by metes and bounds, and grant and convey it and also all the estate, right, title, interest, use, possession, property, claim, and demand whatsoever, of them the said Robert Jamison and Syndonia his wife, of, in, to, or out of the same; "to have and to hold the said described sixty-five acres and sixty-one perches of land, hereditaments and premises, hereby granted," etc., with a clause of redemption in favor of both. At the conclusion is the clause, "in witness whereof, the said parties to these presents, have interchangeably set their hand and seals;" and both the husband and the wife sealed the indenture.

It would seem to be apparent on the face of this instrument, that her interest as well as his, was intended to be conveyed. It can not be supposed that the husband alone intended to convey the estate of his wife. That could only be done by her. And as it is plain her interest was intended to be conveyed, and the indenture could not have effect except by her conveyance, such must be deemed the operation of the instrument, in order to give effect to the intention of the parties. The leading rule of construction of deeds is, in all cases, that the construction be favorable, and as near to the minds and apparent intent of the parties as possibly it may be, and the law will permit: Shep. Touch, 83; Co. Lit. 313; Plow. 154, 160. And another rule is, that the construction be upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be), may take effect and none be rejected, and that all the parts do agree together, and there be no discordance therein: Shep. Touch. 84. Another rule is, that the construction be such as that the whole deed, and every part of it, may take effect, and as much effect as may be to that purpose for which it is made: Id. And this is a rule both in law and equity: 1 P. Wms. 457.¹ For these reasons, I am of opinion, that the mortgage was sufficient to pass as well the interest of Mrs. Jamison as of her husband.

In relation to another part of this objection, that this is an indenture between parties, and she not being named in the premises as a party, is a stranger to the deed, which has no operation as to her, the rule is, that a stranger executing a deed-poll or an indenture not *inter partes* is bound by it, and may also take advantage of it. But where the deed is *inter partes*, he who is a party to the deed, can not covenant with another who is no party. But if a mere stranger, not named a

1. *Butler v. Duncomb*.

party (where the instrument is *inter partes*), covenants with another who is named, and seals the deed, he is bound by such sealing. This distinction is taken by Holt, C. J., in *Salter v. Kidgly*, Carth. 76, and has been often made: See the cases collected in Platt on Cov., 7 Law Lib., January, 1834, and 13 Vin. Abr. 52-57.

In the case of *Salter v. Kidgly*, above mentioned, which is also reported in 1 Show. 56, and Holt, 210, covenant was brought on certain articles of agreement, between J. S. of the one part, and C. R. of the same county, by which J. S. let a house to C. R. at a yearly rent, which C. R. agreed to pay, "and that said rent may be satisfied, I, John Kidgly, do covenant for myself, etc., on behalf of said C. R., to pay," etc., which deed was sealed by C. R. and Kidgly the defendant. It was argued that the defendant was not bound by this covenant, because he was not a party to the deed; and it is a rule in law, that he who is not a party to the deed, can neither give nor take anything by it, except by way of remainder: 3 Cro. 76; 2 Inst. 673; 2 Roll. Abr. 220; 3 Cro. 359; 1 Inst. 352; Roll. 72; 3 Lev. 138; 2 Id. 74. But Holt, C. J., said: "Why can not a man oblige himself by a deed, if there be express words for it, and he seals it? Suppose at the end of an indenture it be 'and be it known unto all men, that A. B. for himself covenants,' etc., and he puts his seal to it, why should not this oblige him? A man can not take immediately when he is not a party; but where do you find that a man can not give without being a party? In a deed of feoffment a warrant of attorney to A. not a party, is good now, though formerly held to be otherwise." And the court was clear in opinion, that the action should lie against the defendant on this deed. So in Perkins, sec. 158, "it hath been holden, that a man shall be bounden by the speaking, if another man, by averment thereof, in putting his seal to it, and delivering of it as his deed." And in section 159, "and it is to be known that at this day, a man shall be bounden by putting his seal unto a deed indented, and delivery of the same, and yet the words within the deed are spoken by another man." I am, therefore, of opinion, that the defendant's interest passed by the sealing and acknowledgment of the mortgage, though she was not named as a party in the premises.

It has been further contended, that a married woman has no power to mortgage her lands. It is believed, however, that nothing has been more usual in Pennsylvania, than for husband and wife to mortgage the wife's lands, by the ordinary mode of

conveyance in mortgage, acknowledged according to the legal form; and it can not be doubted, that the power to convey in fee simple, practiced from the first settlement of the province, and recognized and established by the act of assembly of 1770, confers the right to mortgage—since a power to grant the whole estate necessarily implies a power to grant any lesser estate. This point has been already decided by this court, in the case of *Wilson v. The Harrisburg Bank*, determined at Chambersburg, at October term, 1831.

The form of the acknowledgment is also objected to as defective, in not complying with that which the act of assembly prescribes, in two respects: 1. In stating that she “did of her own free will and accord, seal and acknowledge the within indenture of mortgage,” instead of “seal and deliver;” and, 2. In omitting the word “compulsion.” I am of opinion, however, that although these are literal deviations from the act of assembly, yet the certificate is substantially in compliance with it; and, therefore, the certificate is sufficient, according to the decisions in *McIntire v. Ward*, 5 Binn. 301 [6 Am. Dec. 417], and *Shaller v. Brand*, 6 Id. 435 [6 Am. Dec. 482]. Acknowledging a deed sealed by the party, is tantamount to a delivery of it, if none had been made before. A delivery may be not only by acts, but by words without any act of delivery: Co. Lit. 36 a. The word “coercion” seems to be synonymous with “compulsion,” and substantially to include it.

Judgment affirmed.

Cited in *Louden v. Blythe*, 16 Pa. St. 541, upon the point that parol evidence is not admissible to show what passes at the time an acknowledgment is taken except in cases of fraud or forgery. Also in *Black v. Galway*, 24 Id. 19; S. C., 1 Phila. 494, that a wife may sell or mortgage her separate property for her husband's debts. Also, in *Southwark Bank v. Commonwealth*, 26 Pa. St. 450, that the power to repeal a law involves the power to abrogate a bill in its progress before it becomes a law.

ACKNOWLEDGMENTS, SUFFICIENCY OF.—As to acknowledgments by *femes-covert*, see *Webster v. Hall*, 1 Am. Dec. 370; *Hollingsworth v. McDonald*, 3 Id. 545; *McIntire v. Ward*, 6 Id. 417; *Shaller v. Brand*, Id. 482; *Evans v. Commonwealth*, 8 Id. 711; *Watson v. Mercer*, 9 Id. 411. An acknowledgment taken by a justice of the peace out of the county in which he resides, is void: *Share v. Anderson*, 10 Id. 421. Upon the conclusiveness of a certificate of acknowledgment and the admissibility of parol evidence affecting it, see *Smith v. Ward*, 1 Id. 80; *Watson v. Bailey*, 2 Id. 462.

DEED, WHEN BINDING UPON A PERSON NOT NAMED AS A PARTY THERETO. In the note to *Payne v. Parker*, 25 Am. Dec. 226, this subject is considered at length.

TWELVES v. WILLIAMS.

[3 WHARTON, 485.]

WHERE A. PURCHASED CERTAIN BUILDINGS at execution sale, which were subject to liens for materials furnished in their erection, and which A. agreed should not be affected by the sale, but that he would pay, and then made an assignment for the benefit of his creditors, with certain preferences, including such liens, the assignees are bound by A.'s agreement, and the liens may be enforced against the property, notwithstanding the sale and assignment.

- SCIRE FACIAS on a mechanic's lien, brought by John Williams and William Johnson against Stephen Twelves, with notice to William H. Winder and Alexander Krumbhaar, terre-tenants, for lumber furnished to certain houses in Philadelphia, erected by Stephen Twelves. Plaintiffs proved the furnishing of the lumber, and the filing of their claim and statement within six months. They also read in evidence, against defendant's objection, the following agreement, dated March 22, 1836: "It is understood and agreed that the sheriff's sale of S. Twelves' property, to take place this evening, is at our instance, for the purpose of title, we having purchased the same of Twelves, subject to the liens, and in respect to them stand in his place. And we will either bid up the property so as to pay in full the liens of Williams, and Johnson, and Robert Evans, or buy the property ourselves, and pay their liens, which such sale shall in no respect prejudice or affect until paid off. Signed, W. & L. Krumbhaar." They also read in evidence, subject to a like objection, the general assignment of W. & L. Krumbhaar to two assignees for the benefit of their creditors, conveying to them all their property. This assignment provided that the liens of the plaintiffs should be paid in preference to other debts. The defendants read in evidence a judgment in the suit of *Hinkle v. Stephen Twelves*; also writs of *fi. fa.* and *vend. ex.* issued thereon, and the sheriff's deed of the premises in question, dated March 30, 1836, to W. & L. Krumbhaar, the sale having taken place March 22. Verdict for plaintiffs.

McCall and Randall, for the plaintiffs in error.

Price and Ingraham, contra.

By Court, GIBSON, C. J. Were it not for the agreement to the contrary, the plaintiff's lien would certainly have been discharged by the sheriff's sale. The Messrs. Krumbhaar, however, had power to sell, subject to it; and they actually sold in performance of an agreement to buy the property themselves,

or bid it to a price that would insure satisfaction of this and another incumbrance from the proceeds, with a proviso that they should continue to bind till they were paid. They bought it in; and, by force of the agreement, the lien was an incumbrance on it while it remained in their hands. They have made a general assignment with the usual preferences; and the single question is, whether the assignees in trust for the creditors hold discharged of the lien, as purchasers without notice, and for valuable consideration. It is not doubted, that they are invested with the title, and that the lien, apparently discharged by the sale, and deriving its actual force from a private agreement, was essentially a secret one; but it is contended, that the assignment gave notice of it, or disclosed what would, by inquiry, have led to it. It indeed contains a provision for mechanics' liens by name; but such provision by the owner of a title, acquired through a judicial sale, points rather to personal than to real security, and intimates not the conditions on which it was given. The object being avowedly to procure a title, pursuant to a previous purchase, may have induced the vendee to assume the liens as personal liabilities, in consideration that the creditors would not interfere with the sale; and this shows that to provide for them as personal charges, even by the name of liens, is not necessarily or naturally inconsistent with a previous extinction of them as such. The vendee's responsibility might well be supposed to have been accepted as a substitute for them; and whatever is sufficient to direct an inquiry, must point distinctly to the object of it. It seems, therefore, that there is not enough in the case to affect the creditors with actual or constructive notice; but are they the purchasers for valuable consideration?

It is conceded, that they have not released; and that the interests of the parties remain as they were at the date of the assignment. The assignees, being instruments selected by the debtor, and having no beneficial interest as such, stand in no personal or distinctive equity; for though a pecuniary consideration is always inserted in the deed, where they are not creditors (the necessity of which, to protect the transaction from the statutes of Elizabeth, is shown in *Roberts on Fraudulent Conveyances*, 429, and recognized in *Howry v. Miller*, 3 Penn. 381), it is merely nominal, and not that substantial sort of equivalent which gives a claim to something in return. Then equity, if any, must be the equity of the creditors represented by them; and what substantive or formal advantage

have these surrendered in compensation of the benefits expected from the assignment? None are pretended. Neither are they placed in the category of purchasers by their character or position. That they are not protected as such by the recording acts, was declared in *Heister v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417]; and though it was said, in *Petrie v. Clark*, 11 Serg. & R. 377 [14 Am. Dec. 636], that the extinguishment of a debt is a valuable consideration for a thing taken in satisfaction of it, the acceptance of it as a security without a stipulation for forbearance, was held to be otherwise. So also in *Ramsey's appeal*, 2 Watts, 232 [27 Am. Dec. 301], creditors were held to stand exactly in the equity of their debtor. I know of no case in which the abstract existence of debts was held to be a valuable consideration for a transfer of property to trustees for distributive payment, except *Bayley v. Greenleaf*, to be presently noticed. In *Lord Paget's case*, 1 Leon. 194, it was held, that the mere destination of property to payment of the grantor's debts, by a general assignment to a stranger, is not a consideration even to raise a use on a covenant to stand seised, and consequently, not to pass even the legal title; and there is therefore nothing to sustain it, under the statutes of Elizabeth, against a creditor or a purchaser, though it is good against an heir: *Leech v. Leech*, Ch. Cas. 249.¹ But where the creditors are party to the deed, there is a clear valuable consideration in the forbearance of suit and mutual accommodation expressed by the terms, or implied by the nature of the transaction: *Rob. on Fraud. Conv.* 431.

In the case before us, the creditors, not having become parties to the transaction, by performance of the condition, which alone could make them so, were bound in the mean time to no forbearance or accommodation whatever. In *Bayley v. Greenleaf*, however, an equitable lien of admitted obligation betwixt the vendor and vendee, was not enforced against assignees in trust for the vendee's creditors. In Pennsylvania, such a lien is rejected altogether; but admitting the general existence of it, in that case the question was, whether the creditors were exempt from it as purchasers. For aught that appears, they had relinquished nothing in compensation of the benefits of the trust; nor had they elected to look to it for satisfaction; and though the assignment could not prejudice them, it was held to divest the vendor's lien for purchase money. The reasoning of the chief justice, in delivering the opinion of the

court, is unsatisfactory on principle and authority. Analogous decisions on assignments in bankruptcy and statutory insolvency, were admitted to be adverse to his conclusion; yet though no essential difference betwixt one of these and an assignment by act of the party was pointed out, a distinction was taken on the ground that, by the latter, creditors are purchasers for a specific consideration. What advantage or thing they are supposed to part with in the one case, in order to make them so, which they do not part with in the other, was not attempted to be shown. The truth is, they part with nothing. Before satisfaction or release, the reclamation of a preferred creditor is unimpaired; and the exertion of the debtor's power to provide for him, is consequently gratuitous. The intended preference is a gift of his dominion, which enables him to pay in the order that pleases him; and the thing destined to payment, whilst unappropriated, continues in the hands of his agents, subject to the equities which adhered to it in his own. The appointment of a trustee is in fact no more than a substitution of the hand to pay. Preferred creditors are not more meritorious than the creditors of an intestate, who stand in his place; the difference in other respects being that the trustees succeed to the title by act of the party, and the administrators succeed to it by act of the law; but, in either case, without a beneficial act done or prejudice suffered. When the trust is executed, however, the money can not be followed; but, as was intimated in *Heister v. Fortner* [4 Am. Dec. 417], the creditors must cease to be so, before they can be purchasers. Here the trust remains unexecuted; and as the creditors will not be put in more unfavorable circumstances by the enforcement of the lien than if the assignment had not been made, nothing has moved from them that can prejudice them, or benefit the debtor; and they are consequently not purchasers of its benefits.

Judgment affirmed.

The principal case has been frequently cited in Pennsylvania to show what are the rights of a person who makes an assignment for the benefit of creditors as well as the rights of the assignee; and also the obligation of a person who buys property subject to a mortgage or other lien, and agrees to assume the payment thereof: *Bell v. Moss*, 5 Whart. 205; *Sherk v. Endress*, 3 Watts & S. 256; *Mode's appeal*, 6 Id. 282; *Read v. Robinson*, Id. 331; *Vandyke v. Christ*, 7 Id. 374; *In re Dohner's Assignees*, 1 Pa. St. 104; *Ludwig v. Highley*, 5 Id. 138; *Cowden v. Pleasants*, 9 Id. 50; *Foulke v. Harding*, 13 Id. 245; *Bullitt v. Methodist Epis. Church*, 26 Id. 111; *Mellon's appeal*, 32 Id. 129; *In re Fulton's estate*, 51 Id. 211; *Spackman v. Ott*, 65 Id. 135, all citing the principal case.

CASES AT LAW
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

STEELE v. WILLIAMS.

[DUDLEY LAW, 16.]

TROVER WILL NOT LIE FOR THE OWNER OF THE REVERSIONARY ESTATE in a chattel, prior to the determination of the particular estate.

REVERSIONARY OWNER OF A CHATTEL has no right of action because of an injury done to the particular estate.

TROVER. The chattels whereof the conversion was claimed were, at the time, in the possession of Newell, who held them under a lease from plaintiff for the term of one year. The conversion consisted in the levy upon them of an execution issued against Newell, and their sale thereunder. Possession of some of the articles sold was never taken from Newell by the purchasers, while the bids of the other purchasers were satisfied by plaintiff's son, who left the articles in Newell's possession. The evidence tended to prove that plaintiff's claim of property in these articles was merely colorable and intended to protect them from Newell's creditors. Upon this defendants grounded their motion for a new trial, verdict having gone against them. They also moved for a nonsuit.

G. W. Williams, for the defendants.

Clinton, contra.

EARLE, J. On the case made by the proof, it would not be easy for the plaintiff to make out his right to retain this verdict. The whole of the evidence showed clearly that the claim of the plaintiff was colorable only, and intended

merely to protect the property against the creditors of Newell; and on the grounds taken for a new trial, we should be very unwilling to allow the verdict to stand. But the motion of the defendant for a nonsuit presents the plaintiff's case in an aspect which forbids that he should recover in this action. To maintain trover, the plaintiff must have not only a right of property, general or special, but also an actual or constructive possession, *i. e.*, the right of immediate possession. At the time of the levy and sale, in March, 1834, the chattels sued for were in the actual possession of Newell, on hire, for the whole of that year; until the end of that term, he had a special property in them, and was entitled to retain possession even against the plaintiff.

In *Ward v. McCauley*, 4 T. R. 489,¹ the plaintiff brought trespass against the sheriff for taking in execution the furniture of the plaintiff in a house to let to Lord Montfort, for a term, ready furnished—and it was held that the action would not lie; and although Lord Kenyon said that trover was the proper remedy, yet afterward, in *Gordon v. Harper*, 7 Id. 9, which was trover brought in a similar case, he said the opinion he had expressed was an extrajudicial one, to which, on consideration, he could not subscribe. And it was held by the whole court, that trover would not lie for the landlord during the continuance of the term, as the tenant had the right of possession; that he would be a trespasser himself if he took them from the tenant, and that trover would not lie in any case unless the property converted was in the actual or implied rightful possession of the plaintiff. But the case here is still stronger against the plaintiff's right to maintain this action. For, supposing him capable of maintaining trespass or trover on the possession of the hirer, his bailee, against one who should destroy the property, or so effectually convert it that he could never recover the possession; the proof is, that without any charge whatever to the plaintiff, the goods were restored to the possession of Newell before the expiration of the term for which they were hired, ready to be delivered up to the plaintiff as soon as, by the terms of the contract, he was enabled to have them. The injury, therefore, was solely to the possession of the tenant during the term, and the plaintiff having sustained no injury whatever, had no right of action, and was not entitled to nominal damages. The plaintiff, therefore, must be called.

The motion for a nonsuit is granted.

1. *Ward v. Macauley*.

TRESPASS OR TROVER MAY BE MAINTAINED wherever the owner had at the time the right of possession, though the actual possession is in another: *Bird v. Clark*, 3 Am. Dec. 269; *Carson v. Noblet*, 6 Id. 554; *Buck v. Aiken*, 19 Id. 535. But where there is no possession, either actual or constructive, trespass can not be maintained: *Foster v. Fletcher*, 18 Id. 208. For a general review of the subject, see the note to *Hostler v. Skull*, 1 Id. 585.

BELL v. MONAHAN.

[DUDLEY LAW, 38.]

TRESPASS WILL NOT LIE FOR THE REVERSIONARY OWNER OF A CHATTEL, for its seizure on execution as the property of the owner of the particular estate.

SUMMARY process for trespass. The trespass alleged consisted in the seizure under an execution issued against Peter Coonrod of a horse claimed by plaintiff as his property. The horse, at the time of the levy, was in Coonrod's possession, under a lease thereof to him by plaintiff. The horse was originally acquired from Coonrod by plaintiff by purchase. This purchase the defendants claimed to have been fraudulent. The presiding judge decreed for plaintiff. Defendants moved for a nonsuit and for a new trial.

G. W. Williams, for the defendants.

Hill, contra.

By Court, BUTLER, J. The defendants have taken a correct legal position in their first ground of appeal. At the time the horse was sold, the plaintiff had neither an actual nor a constructive possession; without which, he can not maintain this action. His possession was not invaded, nor his right necessarily jeopardized, by the sale of Coonrod and Kidd's interest in the horse. When the time had expired for which they had hired the horse, the plaintiff had a right to demand him; and upon the purchaser's refusal to deliver him up, the plaintiff could have brought his action of trover, and upon establishing his right could have recovered such damages as would have indemnified him for the loss of the horse. Or if the horse had been injured by the purchasers, so as to impair his value, the owner could have maintained his action on the case before the time of hiring had expired. These are general principles recognized and enforced in too many judicial decisions now to be disputed.

The case in 4 T. R. 489,¹ and 8 Id. 432,² are explicit on the points.

As the plaintiff may vary his case on another trial, a new trial is granted.

See *Steele v. Williams*, ante, 546.

COHEN v. CHARLESTON FIRE AND MARINE INS. CO.

[DUDLEY LAW, 147.]

OPEN POLICY IS VALID THOUGH IT INSURE AN AMOUNT GREATER IN VALUE than the property; but in such case the recovery is restricted, where a loss has occurred to the value of the property.

NOTICE OF THE CONDITION OF A VESSEL NEED NOT BE GIVEN, prior to its abandonment, where it has arrived in a foreign port in a state that would justify an abandonment.

PORT OF A SISTER STATE is a foreign port.

NOTICE OF ABANDONMENT as for a total loss must be given to the insurer within reasonable time.

WHERE THE COST OF REPAIRS WOULD EXCEED ONE HALF THE VALUE of the vessel as repaired, the insured may abandon for a total loss.

ACTION on a policy of insurance covering the vessel *Harriet*, on her voyage from Charleston to Mobile. The policy, which was an open one, insured the sum of three thousand five hundred dollars, whereas the value of the vessel was only three thousand dollars, and would, even after the value of the stores, wages, etc., were added, only equal the sum of about three thousand four hundred dollars. The voyage was stormy, and the *Harriet* arrived at Mobile very much damaged. The cost of the repairs necessary to render her seaworthy were estimated at from two thousand two hundred dollars to two thousand six hundred dollars. The vessel was accordingly sold. The jury found for plaintiff. Defendants now moved for a new trial.

1. Because the evidence showed the vessel to have been unseaworthy at the time she sailed. 2. On account of the over-valuation in the policy. 3. Because notice was not given to them of the state of the vessel upon her arrival at Mobile. 4 and 5. The loss was a partial loss, that could not be converted into a total loss, nor did the cost of the repairs justify an abandonment. 6. The insurers had a right to repair, which destroyed the right of abandonment.

Petigru, for the plaintiff.

Henry Grimke, contra.

By Court, O'NEALL, J. The first ground of appeal presents a naked question of fact, which was properly submitted to the jury; their decision thereupon is fully sustained by the evidence, and can not be disturbed.

The second ground was not seriously urged below, or here. The valuation of the vessel set down in the policy, was three thousand five hundred dollars, and her true value, including the sea stores, wages of seamen, and insurance, amounted to three thousand four hundred and twelve dollars and fifty-two cents. The policy in this instance was an open and not a valued one. The value set down in the contract had no effect upon the rights or interests of the defendants, and hence does not affect its validity. The plaintiffs, to recover, were bound to show the true value of the vessel, which they proved to be three thousand dollars.

The third ground presents a question of no difficulty. Notice of the state of the vessel on reaching her port of destination, was not necessary to be given before the assured could abandon, and treat her as a total loss. If the vessel had been in the port where she was insured, then, indeed, there would have been some reason in saying that the underwriters ought to have had notice before a sale of the vessel could be made. But in a foreign port, which Mobile must be considered to be, it could not be expected that any such notice should be given; if the state of the vessel was such as to constitute a total loss, then the subsequent disposition of the vessel by sale could not affect the right of the assured to claim accordingly. All that could be required, would be that the assured or the master of the vessel, should under such circumstances, do that which a prudent man, uninsured, would do. The testimony very clearly shows that the vessel was unworthy of repair. The sale was, therefore, the very act which any man would have wished and directed. But a conclusive answer to this objection is found in the fact, that the very intelligent officer at the head of the insurance company (Mr. Haslett), by the authority of the board of directors, placed their refusal to pay the claim of the plaintiffs on the ground, that the injury done to the vessel did not justify an abandonment for a total loss.

In connection with this ground the defendants' counsel argued, that the company ought to have had notice of the abandonment, or rather that the plaintiff has abandoned as for a total loss, within a reasonable time. There is no doubt about the rule, and if there had been any foundation in fact for the

argument, the objection would have been raised in Mr. Haslett's letter to the plaintiff's attorney, declining to pay the loss on a different ground. Indeed, no such ground was pressed below. The fact of abandonment within proper time was considered as either not disputed, or as plainly to be inferred from Mr. Haslett's letter. After the jury, having all the circumstances of the case before them, have found for the plaintiffs, it is not to be slightly inferred that there was no evidence of an abandonment; from slight evidence we should be disposed to say that they had deduced a proper conclusion.

The sixth ground may be disposed of at once by saying that the insurers made no offer to repair, and hence they can claim no benefit from a right (if any such exists), which they did not exercise.

The whole merits of the case rested on the fourth and fifth grounds; these, at the court below, were very properly debatable matters, but the defendants had the advantage of the rule contended for by them, laid down as broadly as they could desire, and a verdict founded upon the facts under the law ruled as they contended it should be, can not be disturbed. I have no doubt that in the case of a claim for a total loss, if the repairs at the port where they are to be made, will exceed one half of the actual value of the vessel at that place after she is repaired, that the assured may abandon and claim for a total loss: *Palapasco Insurance Company v. Southgate et al.*, 5 Pet. 619. This may be illustrated in this case in this way. The cost of repairs, according to the ship carpenter's testimony, may be set down at two thousand four hundred dollars. The vessel sold for eight hundred and ten dollars, making her aggregate value, when repaired, three thousand two hundred and ten dollars; taking this as the true value at Mobile, the repairs would greatly exceed one half of the value. The company would not, however, be bound by the sale in the estimating the value of the ship; they might show that she was sold for too small a sum. This is, however, not pretended on the present occasion.

But I did not confine the jury to this view; I told them that in a claim for a total loss, it was questioned by able jurists, whether in ascertaining the amount of repairs, one third new for old ought to be deducted: Ph. Ins. 403; and that they might, in this case, take the affirmative of the question as granted, and deduct one third, new for old, and assume the value of the vessel to be as it was when she sailed, three thousand dollars—in this point of view, the cost of repairs exceeded

one half, for the total cost was estimated at two thousand four hundred dollars—deduct one third, new for old, eight hundred dollars, would leave the cost of repairs one thousand six hundred dollars, exceeding by one hundred dollars, the half of the value of the vessel.

The motion for a new trial is dismissed.

GANTT, J., dissented.

SHIP DAMAGED FOR MORE THAN ONE HALF of her value may be abandoned as for total loss: *Deblois v. Ocean Ins. Co.*, 28 Am. Dec. 245; *Hyde v. Louisiana State Ins. Co.*, 14 Id. 196; *Abbott v. Broome*, 2 Id. 187.

ADMINISTRATORS OF PATTON v. MAGRATH.

[DUDLEY LAW, 159.]

COMMON CARRIERS ARE LIABLE FOR THE LOSS BY FIRE of goods intrusted to them for transportation, though they are steam carriers and therefore obliged to use fire to propel their vehicles of transportation.

CUSTOM TO IMPOSE A RESTRICTION upon a general rule of law must be certain, reasonable, and of such general practice that the inference is fair that both of the contracting parties contracted with reference thereto.

ACTION for the loss by fire of fourteen bales of cotton, shipped on board the steamboat *Augusta* to be carried to Charleston. The cotton had been delivered by lighter. In the lighter it remained over night alongside of the *Augusta*, and was there burnt. The fire originated at a time when the captain and crew of the *Augusta* had retired to rest. The jury, in disregard of the charge of the judge below, found for defendants. Plaintiffs appealed and moved for a new trial.

Benj. F. Hunt, for the plaintiffs.

Petigru and Lesesne, contra.

RICHARDSON, J. This court concurs in the opinion of the circuit judge on the law of the case, as expressed in his charge to the jury. The loss by fire, which, occurring in another boat, renders the owner liable, will in like manner make liable the owner of a steamboat, propelled by fire. The reason of the severe accountability of common carriers is, because their possession of the cargo makes it an easy matter for them to take or purloin the goods; and as easy to get up a pretended accident or misfortune, and pass it off as the cause of the loss. In like manner, it is easy for a carrier, choosing as he may his own

agents, time, and place, to confederate with robbers. It is for these considerations that the law, proceeding on the moral principle of prudent prevention, cuts off the temptation of pecuniary gain, and makes the carrier liable for all losses, unless they occur through the depredations of public enemies, or some act of Providence, against which human strength and care can not guard. The sudden shifting of the channel, or the recent introduction of a hidden sawyer or snag, which are among the natural incidents of our rivers, have been, when unknown, always holden within the latter exception. But, with these exceptions, the carrier's undertaking is to deliver his cargo at the destined port, or be answerable. If he does not so deliver it, he must pay the value in money; and then he is entitled to freight, just as if he had delivered the specific goods. In this situation, the present defendants stand. They and the plaintiffs, morally speaking, are innocent; but one or the other must bear the loss—and the law decrees it to the carriers. This is enough for the court to know, and, knowing, must preserve the law. But in a case of novel application, and for the satisfaction of the many interested in the principle, I may add, that the carrier who undertakes to deliver freight, through the extra danger of fire-engines, can with less reason than other carriers, plead that the loss has occurred by an unavoidable, providential misfortune, where it has been caused by the very means he has himself introduced into the hull of the boat: and for which he must, on that account, be more clearly liable.

Again, on account of the habitual use of the steam power, which is attended with peculiar danger from fire, it becomes the more easy to purloin a rich cargo, then fire the boat, and make it appear that the cargo too had been burned by a very common accident, from the furnace of the steamer. Such bad faith could not be apprehended in this case; but once permit the fleets of steamboats that run the Tennessee, or ply between St. Louis and New Orleans, to have such a manner of exempting the owners from loss by fire, and who can tell the consequences to the unwary, or the gain to the fraudulent? Need I remind the owners of steamboats that they have but to give public notice that they will not be liable in a certain class of cases; and, to deceive no one, give no other bill of lading but with the express exception written, “not to be liable for accidents by fire”—and they then make the desired exception, the law of the contract. If there be then any grievance from the severity of the law, they hold the remedy at their own discre-

tion. And I would here apply to all carriers who inveigh against the severity of the law, which, for general purposes, is wise, the same observation. They may and will relieve themselves, whenever essential to their interests, by special acceptances.

I am bound to notice the supposed custom, in favor of boats propelled by the agency of fire. Custom may well form an exception to a general rule of law: but it must be immemorial, certain, and reasonable; it ought to appear, by proof of much practice, that parties on both sides had acquiesced in the specific custom; and then it would be just to conclude that they had adopted the custom in place of a particular contract, for each case; and a custom so sanctioned would become, as a peculiar act of legislation, of which all persons must take notice, at their own peril. But the custom set up in the present case was very recent, as, indeed, is the use in this state of steamboats themselves, had been practiced in very few instances, and was quite uncertain and vacillating. We can not yield up the well-adjudged and established rules of law, for a custom which seems to consist more in the practice, opinions, and wishes for such a custom, by one party, than in any assent to its prevalence and adoption by the party on the opposite side.

We decide the case upon the general grounds of the law, and the custom, as that is evidently desired: and I therefore say little of the fourth ground of appeal. But inasmuch as the cotton was burned outside of the steamer, in the night, and when she was at anchor—it would be hard to trace the loss to the fire, which is necessary to the engine only when in practical use, or under preparation. Unless we conclude first, that there was a want of careful vigilance over such fire, who can tell, when all were asleep, where the fire came from? Let a jury reconsider the case.

A new trial is granted unanimously.

LIABILITY OF COMMON CARRIER FOR LOSS BY FIRE.—The liability of a carrier is for all losses of property intrusted him, not caused by the act of God or of public enemies: *Colt v. McMechen*, 5 Am. Dec. 200; *Schieffelin v. Harvey*, Id. 206; *Elliott v. Rossell*, 6 Id. 308; *Williams v. Grant*, 7 Id. 235; *Craig v. Childress*, 14 Id. 751; *Ewart v. Street*, 23 Id. 131; *Smyrl v. Niolon*, Id. 146; *Jones v. Pitcher*, 24 Id. 716; *Daggett v. Shaw*, 25 Id. 439; *Robertson v. Kennedy*, 26 Id. 466; *Turney v. Wilson*, 27 Id. 515. It would be useless to multiply the authorities that might be cited in support of a proposition so elementary. Loss by fire may be attributable either to negligence or to what may be termed inevitable accident. If a loss has been caused by the

negligence of the carrier, he clearly must shoulder the responsibility. But if the other aspect of the case presents itself, if the carrier has been guilty of no negligence, if the loss by fire has been the result of inevitable accident, can he be excused from liability because "inevitable accident" is but another form of the expression "act of God"? In *Forward v. Pittard*, 1 T. R. 27, the case was that after delivery of hops to a common carrier for transportation, a fire broke out one hundred yards away from their place of storage, and, raging with unextinguishable violence, reached the place of storage and consumed it, together with the hops. The jury found that there had been no negligence on the part of the carrier. The question being as to the liability of the carrier, Lord Mansfield said: "A carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except the act of God or the king's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force come to rob the carrier, he is liable: and a reason is given in the books which is a bad one, viz., that he ought to have sufficient force to repel it: but that would be impossible in some cases, as in the riots in the year 1780. The true reason is for fear it may give room for collusion, that the master may contrive to be robbed on purpose and share the spoil. In this case it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident." The language of the cases is quite general, that the only fire that may be attributed to the act of God is one that is originated by lightning.

As this cause of fire may be practically considered as non-existent, it may be said that a common carrier's liability, in the absence of any special agreement, is absolute as to all losses occasioned by fire: *Lakeman v. Grinnell*, 5 Bosw. 625; *Moore v. Mich. Cent. R. R. Co.*, 3 Mich. 23; *Gilmore v. Carman*, 1 Smed. & M. 279; *Mittler v. Steam Nav. Co.*, 6 Seld. 431; *Angle v. Mississippi and Mo. R. R. Co.*, 18 Iowa, 555; *Porter v. Chicago & Rock I. R. R. Co.*, 20 Ill. 407; *Cox v. Peterson*, 30 Ala. 608; *Harrington v. McShane*, 2 Watts, 443; *Thorogood v. Marsh, Gow*, 105; *Hyde v. Trent Nav. Co.*, 5 T. R. 201. Some of these cases were of considerable hardship, as, for instance, that of *Mittler v. Navigation Co.*, *supra*, where a fire originating on shore at a point a quarter of a mile distant from a barge in the river in which were the goods consumed, was by a sudden gale of wind carried in a few minutes to the place where the barge lay, which was thereupon consumed. The rule, however, bends to no hardship, being alike inflexible and certain. Congress, however, in the exercise of its power "to regulate commerce with foreign nations and among the several states," has enacted that "no owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board such vessel, unless such fire is caused by the design or neglect of such owner." Rev. Stat., sec. 4282. It was held, in *Walker v. Transportation Co.*, 3 Wall. 150, that this section exempted the owners of vessels in cases of loss by fire, from liability for the negligence of their officers or agents, in which the owners have not directly participated.

Where the carrier has exempted himself from liability for losses by fire, by special contract, the exemption will not be allowed to extend to losses by fire occasioned by his negligence or that of his employees: *Swindler v. Hilliard*, 2 Rich. 286; *Pemberton Co. v. New York Central R. R. Co.*, 104 Mass. 144; *Montgomery and West Point R. R. Co. v. Edmonds*, 41 Ala. 607; *Empire Transportation Co. v. Wamsutta Oil etc. Co.*, 63 Pa. St. 14; *Powell v. Pennsylvania R. R. Co.*, 32 Id. 414.

Exemption from liability on account of "dangers of the river" does not extend to loss occasioned by fire on a steamboat: *Gilmore v. Carman*, 1 Smed. & M. 279.

FONVILLE v. MCNEASE.

[DUDLEY LAW, 303.]

WORDS WRITTEN AND PUBLISHED are actionable *per se*, where they are calculated to reflect shame and disgrace on the person of whom they are written, or to hold him up as an object of hatred or contempt, though they impute no crime.

WRITTEN WORDS ARE NOT PUBLISHED, in the sense that will support a civil action, where the instrument containing them reaches the person only of whom they are written, though the latter afterwards makes its contents public.

VERBAL ADMISSIONS OF A PARTY OF HIS AUTHORSHIP OF AN INSTRUMENT that has reached the person of whom it is written, upon being questioned as to the matter by the latter, in public, constitutes no publication.

ACTION on the case for a libel. On the trial a nonsuit was granted, because the written words were not actionable *per se*, and also because there was no publication. The opinion states the other facts of the case.

Dargan, for the plaintiff.

Sims, *contra*.

By Court, O'NEALL, J. Upon the first ground of appeal, the whole court differ in opinion with the judge below. Starkie, in his treatise on slander and libel, at page 161, thus sums up the doctrine: "An action lies for any false, malicious, and personal imputation effected by writings, pictures, or signs, and tending to alter the party's situation in society for the worse:" *Bell v. Stone*, 1 Bos. & Pul. 331. This is the settled English doctrine, and although it has been assailed by Mr. Starkie and others, as being a distinction between written and verbal slander without any real difference, yet I confess I can not take that view of it. Words are evanescent; they are as fleeting as the perishing flowers of spring; they are often the results of mere passion; but written slander is to remain; it is to be treasured up by

every other malicious man for his day of vengeance; it is the effect of deliberate design, and, therefore, is the evidence of malice, without which, actual or implied, no action of slander could be maintained. But the distinction prevails in this state as well as in England. In the case of *Mayrant v. Richardson*, 1 Nott & M. 348 [9 Am. Dec. 707], the second count in the declaration was on a letter imputing to the plaintiff an "affected mind." It was not denied that the words written would be actionable, which if spoken would not be. Judge Nott, in delivering the opinion, said: "It has been held that words written and published are actionable, which if spoken would furnish no ground. But then they must be such, as in the common estimation of mankind, are calculated to reflect shame and disgrace upon the person they are spoken of, and hold him up as an object of hatred, ridicule, or contempt." The case of *Leckie ads. Couty*, was decided by the court of appeals upon the same distinction: vol. 3, MS. Decisions, 494. These cases conclude the matter. It is not denied that the letter of the defendant to the plaintiff is calculated to reflect shame and disgrace upon the plaintiff, and to hold him up as an object of hatred, ridicule, and contempt. There can therefore be no doubt that it is a slander for which an action lies without stating or proving special damage.

Upon the second ground, a majority of the court agree with the judge below, that there was no publication. There is a great distinction in this respect between an indictment, and an action of slander, for a libel. In the first, the end is to prevent a breach of the peace; and hence a publication to the party of whom it is written, will be enough. In slander, the object is to redress the party for an injury done to his character, which is nothing more than the good opinion of his neighbors and acquaintances. If the knowledge of the slander be altogether confined to himself, he has sustained no damage. If the defendant only communicated the slander to the plaintiff, then he has committed no wrong for which he is liable civilly. If the plaintiff afterwards make public the charge, the defendant is not answerable for the consequences—for the act of publication is not his.

These principles seem to be so plain, as only to require to be stated to receive the assent of every one. It is, however, contended that in three ways the defendant has published the slander: 1. By throwing the letter sealed into the inclosure of the witness. 2. By addressing it to the plaintiff or Susan

Sloan; and 3. By admitting its contents when interrogated concerning the same by the plaintiff, in a public company at Darlington court-house.

Upon the first, it may be remarked, that since *Lake v. King* (A. D. 1670), 1 Mod. 58, it has been held, that if a man write a scandalous letter and deliver it to the party himself, it is no slander. Sending a letter to a party under seal, is the same as delivering to the party himself. For in such a case the party shows his intention that it should correct him alone, and be unknown to others. The case of exception to this rule is, where a letter was addressed to a man whose clerk was in the habit of opening and reading his letters, and this fact was known to the defendant, and the clerk did open and read the letter; there it was held to be the publication of the defendant, for a third person had come to the knowledge of the charge, by the act of the defendant. Here the fact of throwing the letter, sealed, into an open inclosure, might have led the impertinent curiosity of a finder to pry into its contents; and if this had happened, I should have held the defendant answerable for the publication, which would have then resulted from his act. But the letter reached its address unopened, and so far there was no publication in fact.

2. The address of the letter to the plaintiff or Susan Sloan, does not of necessity, I think, make the defendant answerable for a publication of the slander of, and concerning the plaintiff. The address would have authorized either to open and read the letter; and if the proof had been that Susan Sloan had read the letter, or hearing of it, had required the plaintiff to read it to her, and he had so done, I should have thought the fact of publication proved. But the letter reached him—he opened and read it of his own head to the witness and his family. Whether Susan Sloan was or was not present, does not appear. His act on his part can not be visited on the defendant. He himself published the defendant's slander, and must bear the consequences of his folly.

3. The defendant's answers to the questions put by the plaintiff, as to the contents of the libel, can not, I think, be regarded as his (the defendant's) publication. The plaintiff stated the contents, and the defendant merely assented that they were contained in the letter, the authorship of which he had avowed. This was no fresh publication. If there had been a previous one, it would have been evidence enough to charge him with it. The fact as to which he was questioned, was merely to fix the

identity of the letter, the authorship of which he had admitted: Writing it, if a publication in fact, without the agency of the plaintiff had taken place, would have made the defendant answerable.

The motion to set aside the nonsuit is dismissed.

EVANS and BUTLER, JJ., concurred; the latter, however, not without entertaining some doubts as to the correctness of the opinion.

RICHARDSON, J. The nonsuit was probably ordered upon the ground that, as the plaintiff proved no special damage, the action could not be supported. But such doctrine is deemed erroneous by the court: so that the nonsuit must be set aside, unless the evidence of the publication of the libel was too weak to carry the case to the jury.

Upon this point the court is divided. The facts are plain. The defendant wrote the libel—sealed it—directed it, in the form of a letter to the plaintiff, or Miss Susan Sloan—requested a witness to carry it to the plaintiff, or drop it near his residence. The witness refused; and the letter was afterwards picked up by a stranger, and delivered to the plaintiff, who opened and read it aloud. The defendant afterwards avowed that he wrote it. Is this such evidence of a publication by the defendant as to save the plaintiff from a nonsuit? is the question.

In the case of *Rex v. Besse*,¹ 1 Ld. Raym. 417, it is laid down that the libel being written by the defendant, is *prima facie* proof of publication, and throws on him the burden of disproving such presumption: 2 Saund. 809. So also, in *Baldwin v. Elphinstone*,² 2 W Bl. 1038, printing is *prima facie* proof of publication. In *Rex v. Burdett*, 4 Barn. & Ald. 135, the mere parting with the libel, whereby the defendant gave up his control over it, with the intent to print, was held to be *prima facie* proof of publication.

It was decided in the case of *Phillips v. Jansen*, 2 Esp. 624, that a written libel may be published in a letter to a third person. And although the publication of a libelous letter to the plaintiff alone, will not support a civil action, yet it will an indictment. But this was a mere *nisi prius* decision of Lord Kenyon. And Williams, in his note to the case of *Lake v. King*, says, if a letter containing a libel is sent to another, or the party himself, it is a publication; and quotes 2 Bl. 1039; 1 T. R. 110³—and the jury must decide whether the publication be sufficient

1. *Rex v. Beare*.

2. *Baldwin v. Elphinstone*.

3. *Weatherston v. Hawkins*.

or not. But in case of a letter to the party himself, where the defendant knew that the plaintiff's clerk usually opened his letters, it was held in *Delacroix v. Thevanot*, 2 Stark. 63, to amount to publication, and to support a civil action.

Now, how much stronger would that case have been, if the libelous letter had been directed to the plaintiff, or his clerk, which is the fact in the case before us, i. e., to "John A. Fonville," or "Miss Susan Sloan." On the other hand, if the letter had been directed to Miss Sloan only, it would not have been better directed to a third person, than when to the plaintiff, or "Miss Sloan;" or if a duplicate had been directed to her separately, it would have been the same, and no more, than the letter to the plaintiff, or "Miss Sloan."

In either, it is precisely the case of *Phillips v. Jansen*, that is, a libel published in a letter to a third person. I do not take the meaning to be that the mere sealing up the libel and sending it to a third person, is publication *ipso facto*. But that if the libel should in consequence become known to the third person, or should, in any way, become notorious, then the writer becomes responsible for the publication, which his conduct in sealing and sending the letter gave rise to. This is the principle in *Burdett's case*, and all that class, with the single exception of the letter to the plaintiff alone. It is in such sense that Lord Holt says, that when a libel is produced in the handwriting of a man, he is taken in the manor: Lord Raym. 417; 4 Esp. 248;¹ that is to say, the writer is *prima facie* liable, if the libel has been practically published, no matter how; unless he disprove the publication being his act. He stands like the man who threw a lighted cracker into a crowd, which being thrown from hand to hand, at length put out the eye of a by-stander. The first aggressor was held liable for the whole injury. Many are the analogous instances, of attaching the consequences to him who begins mischief. It is a principle; and such a rule applies with much force, to a libeler who commences in malice, not in sport merely.

There is a fact which should make this rule strong against the defendant. After the libel had been published, he deliberately avowed it to be his act in all its details—gave it the sanction of his name, and did not disavow the publication. May it not then be inferred, that he had propagated, as well as originated, the defamation? In such cases, malice is the important ingredient; and if publication has practically followed, we are

1. *Mullett v. Hutton*.

not to infer the negative, nor to be astute in order to shield the slanderer; but leave the jury to refer the publication to the malicious author, from slight circumstances, and the character of the case. If men may differ upon the evidence, or the judicial mind vacillates, it is enough, the case must go the jury. And, I repeat, that it is improbable, that this was the ground upon which the nonsuit was ordered on the circuit.

GANTT, J., concurred.

WORDS WRITTEN AND PUBLISHED may be libelous, which if spoken would not be actionable; so a publication rendering a person ridiculous, or exposing him to contempt, or impairing his standing in society, as a man of rectitude or principle, is libelous: *Colby v. Reynolds*, 27 Am. Dec. 574; *Watson v. Trask*, Id. 271 and note 273.

SENDING LIBELOUS LETTER TO PARTY LIBELED is sufficient publication to support a criminal action: *State v. Avery*, 18 Am. Dec. 105.

TUCKER v. WILLIAMS.

[DUDLEY LAW, 329.]

DONEE UNDER DEED FRAUDULENT AS TO CREDITORS is liable to them as executor *de son tort* for personal property, the possession of which he has taken, and which he has consumed subsequently to the death of his donor.

SUMMARY process against defendant as executrix *de son tort*. The presiding judge decreed for plaintiff. Defendant now moved to set the decree aside.

Black, for the motion.

Tradewell, contra.

By Court, O'NEALL, J. That the defendant used the crop, which the deceased left at his death, is enough to fix her with the character of executrix *de son tort*, and fully justifies the circuit decree. For she had no pretense of title whatever to it. The deed to her and her children bears date the eighteenth of March: and after enumerating certain property, says: "Finally all my goods and chattels which I am now in possession of, with the exception," etc. The crop was raised subsequent to the eighteenth of March; it was then, probably, not even planted—it can not, therefore, be regarded as any part of the goods and chattels of which Dinkins was in possession on the day of the date of the deed. But the defendant, as a donee in possession, was properly chargeable as executrix *de son tort*. The deed to

her and her children purported on its face to be in consideration of natural love and affection: it is of the donor's whole estate. For it appeared that the reservation mentioned in the deed, to pay his debts, was worthless. He had no land; and the accounts alluded to were not shown to be of any value.

Under such circumstances, it can not be doubted that the deed is at law fraudulent and void, as against existing creditors. The deceased, at his death, was in actual possession of the property. For after his death, the very property now in dispute was by the defendant produced to Mr. Debruhl, who was about to administer, as Dinkins' property. All the witnesses said he was at all times in possession of it. This, added to the fact of the voluntary character of the deed, made it covinous in every sense. The donees' possession commencing subsequent to the intestate's death, under a title void against the creditors, makes her chargeable as executrix *de son tort*. This will be made plain in this way. To charge her as such, it is only necessary to show her possession and use of the goods of the deceased. This is done *prima facie*, that he died in possession, and that she came to the possession after his death. To answer and rebut this she must show a legal title to the property or possession; this can not be done by the deed as against a creditor, for as to him it is void, and hence she is left as a wrongful possessor, and must be so charged. This view is fully sustained by *Bethel v. Stanhope*, Cro. Eliz. 810; *Hawes v. Leader*, Cro. Jac. 271; *Edwards v. Harben*, 2 T. R. 587. If this view was not the true one, a creditor would at law be without remedy. For if he administered, he would be regarded as standing in the place of his intestate, and then he could not dispute the donee's title. For no matter how fraudulent it might be against a creditor, yet it would bind the donor, and consequently his administrator, as was fully decided in *Crosby v. Shelton*, spring term of the court of appeals, 1830; and *Chappell v. Brown*, 1 Bail. 528. If he procured another to administer, and he suffered a recovery against him as administrator, the plaintiff's execution could not be levied on this property, for the administrator could not recover it from the donee, and hence it would not be liable, as assets, in the administrator's hands, to the execution: *Anderson v. Belcher*, 1 Hill, 246 [26 Am. Dec. 174].

The motion is dismissed.

CASES IN EQUITY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

GILMORE v. WHITESIDES.

[DUDLEY EQUITY, 14.]

DELIVERY OF PROPERTY IS CONSTITUTED BY SUCH ACTS as transfer the right of dominion and control over it, and therefore delivery of a deed authorizing the exercise of dominion and control over property is equivalent to a delivery thereof.

DEED CAN NOT OPERATE AS A DONATIO CAUSA MORTIS unless there has been a delivery of the deed during the life of the grantor.

NO DELIVERY CAN BE HAD OF A DEED SUBSEQUENT TO THE DEATH of the grantor, though the latter has placed it in the hands of an agent with instructions to deliver after his death.

DEFECTS IN A VOLUNTARY INSTRUMENT will not be aided in favor of collateral relations, to the prejudice of the wife.

BILL in equity: Complainant was widow of Joshua Gilmore, who, she alleged in her bill, died intestate, leaving as heirs herself and a minor son, Francis. Francis soon after died, while yet a minor, leaving complainant entitled in consequence to the entire estate of which Joshua died seised. Complainant therefore demanded of Whitesides, who had administered upon Joshua's estate an accounting, and called upon the other defendants to exhibit their claims to the property. These claims originated under an instrument executed by Joshua during his life-time, whereby, in consideration of natural love and affection, etc., he gave, granted, and confirmed unto his son, Francis Gilmore, his executors, etc., forever, all his real and personal estate; provided that if the said Francis did not come to the age of maturity the said estate should go to certain enumerated legatees, of whom defendant, James Gilmore, was one, subject, however, to the support of his wife during widowhood

or good behavior. This instrument was signed "Joshua Gilmore," but bore no seal. It was attested by two witnesses. The instrument was delivered to William Edmonds, with instructions to keep it until the day after Joshua's death, when he was to deliver it to Whitesides, who should take possession of the property for the child. The other facts appear from the opinion.

Rogers and Dawkins, for the complainant.

G. W. Williams, contra.

JOHNSTON, Chancellor. The only impediment in the way of the complainant, is the instrument executed by Joshua Gilmore. It is contended that that paper is good: 1. As a testamentary disposition; 2. As *donatio mortis causa*; or 3. As a deed.

1. The instrument wants the formalities required in testamentary papers, by the act of the legislature, and can not, therefore, stand on that ground.

2. As *donatio mortis causa* it could, at most, be supported only as to the personalty. But my impression is, that it can not stand on this ground at all.

There is no evidence that Joshua Gilmore was in ill health when he signed it; or that he signed it in prospect of death, with a view that it should be void if he should survive the danger: 2 Ves. jun. 121,¹ 546;² 1 P. Wms. 404;³ 2 Kent Com. 444. There was no delivery of the property. The leading case on the necessity of such delivery is that of *Ward v. Turner*, decided by Lord Hardwicke, in 1752: 2 Ves. sen. 431; 2 Ves. jun. 112.⁴

The lord chancellor, in that case, appears to go the length that even in cases where the terms of the donation are expressed in writing, the delivery of the instrument will not dispense with delivery of the property, and mentions two cases very much resembling the one at bar. In *Ouseley v. Carroll*, the first of them, an instrument was left, not in the form of a will, but of a deed, viz.: "I have given and granted, and give and grant, to my five sisters, etc., their heirs, etc., in case they survive me, all my real and personal estate." The other case, *Shargold v. Shargold*, was upon a deed of gift of Doctor Pope, not to operate till his death; and there was some attempt at delivery of property, sixpence having been delivered by way of symbol, to put the grantee in possession. Both these papers were admitted to probate as testamentary, notwithstanding strenuous objections that they were *donationes mortis causa*.

1. *Tate v. Hilbert*.

2. *Blount v. Burrow*, 1 Ves. jun. 546.

3. *Drury v. Smith*.

4. *Tate v. Hilbert*.

In *Tate v. Hilbert*, 2 Ves. jun. 120, Lord Loughborough questions, I think justly, the soundness of the doctrine that actual delivery of property is necessary in all cases. After stating the import of Lord Hardwicke's opinion, he observes: "It is not necessary in the case before me, to discuss whether delivery is necessary in all cases. Perhaps it might not be difficult to conceive that it might be by deed or by writing; it might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the ecclesiastical court; and that the property so given is not to be possessed by the executor. It is bad against creditors, and therefore within the reach of creditors, but does not regularly fall within an administration, nor require any act by the executor to constitute a title in the donee."

When we consider the real purpose of delivery, 2 Hill, 587,¹ I think we shall have freed ourselves from nearly all difficulties on this subject. The object of delivering property is to give a control over it. Whatever invests one with such control is a delivery. An actual delivery has never been required, other than such as the nature of the property intended to be transferred was susceptible of. A symbol will not do. But the delivery of a key, under which goods are, is a delivery of the goods; "because," as Lord Hardwicke observes, 2 Ves. sen. 443, "it is the way of coming at the possession, or to make use of the thing." Upon this principle, when a deed is delivered, which by its terms authorizes him who receives it to take possession and control the property, it is as good as if there had been an actual tradition of the property itself.

I think that a *donatio mortis causa* may be declared, as well in writing as orally, and that if a writing be delivered, declaring the terms of such gift, that is sufficient. But I hold when a donee is driven to depend on such writing, it is essential that it should set forth in explicit terms, a *donatio mortis causa*. In the present case the paper relied on is deficient in this respect. In its terms, it is a gift *in præsentî*; not dependent at all on the recovery of the donor. The only condition on which the first donee's title is to be defeated, is his failing to arrive at full age; and even that does not revest the title in the donor, but carries it over to other persons named in the instrument. The delivery of such a deed, if good at all, is good as an absolute parting from all title by the grantor. This brings me to consider the third question stated, which is,

1. *Southworth v. Sebring*.

3. Is the instrument good as a common deed? And I think it must fail for want of delivery. If it had been duly delivered, it could not have carried the realty, for want of conformity to the act in such cases. But the delivery was not such as, in my opinion, can give it effect, even as to the personalty.

No cases were quoted on this point; nor was it sufficiently argued. My impression, therefore, has been formed without the advantage of authority. But such as it is, it may be expressed in few words. The delivery was to an agent of the donor, to be perfected by a further act of delivery, by the agent, after the donor's death. Now, although a delivery to one person, for another, may be good, this can only be the case, I think, where it is an unconditional delivery; or where it is upon a condition over which the grantor can have no further control; as, for instance, where an escrow is placed in the hands of a third person, to operate upon the payment of money, or some other act of the grantee, over which the grantor has no control, and the performance of which, by the grantee, will entitle him, even against the grantor's will, to the possession of the paper and of the property. In such case the act done by the grantor is not revocable by him. But here, it is not pretended but that Gilmore might, at any time, have resumed the paper and recalled the gift. The title was, then, in him, till his death, and could not pass but by a testamentary disposition. All authority previously given by him, to his agent, expired at his death; nor could the agent, after his death, do anything whatever, to perfect a title from him, any more than he could have made a deed or will in his name.

It has been argued that equity will supply defects, in order to effectuate the intention of the parties; but this is not done in cases like the present. It may be done in favor of a wife or child; not for collaterals, and certainly not for collaterals against the wife. I think, however, the cost must come out of the estate.

It is decreed that the plaintiff, as distributee of her late husband and child, named in the pleadings, is entitled to the whole of the realty of which the said husband died seised; and that as distributee of her husband, she is entitled to one third; and as administratrix of her said child, to the other two thirds of the personalty whereof her said husband died possessed, or entitled unto; and that the administrator of her said husband do account to her accordingly. The costs of the suit to be paid out of the said husband's estate.

From this decree the defendants appealed, on the following grounds:

1. Because the instrument of writing executed by Joshua Gilmore, in his life-time, was valid as a deed, and conveyed his whole estate, both real and personal, to the parties therein named.

2. Because said instrument was sufficient, at all events, to convey the personal property.

3. Because, if the deed was imperfect in its execution, the court should have supplied the defect, and carried into effect the intention of the donor.

4. Because the disposition of his property, by Joshua Gilmore, in said instrument of writing, was good as *donatio mortis causa*.

By Court, HARPER, Chancellor. The reasoning of the chancellor is so conclusive on the several points involved in the case, that it is hardly necessary to add anything to it. A single case, however, has been quoted in opposition to his conclusion, which would be in point if the paper before us were a deed. It was quoted from 4 Dane Abr. 9, and is to be found in *Belden v. Carter*, 4 Day, 66. In that case, the donor delivered that which purported to be a deed, to a third person, saying: "Keep it, and if I do not call for it, deliver it to the donee after my death." After the donor's death, it was accordingly delivered to the donee, and the court held this to be a good delivery. But upon the best consideration we have been able to give it, we do not perceive that the conclusion of the court is sustained by authority or argument. The argument of the counsel (Roger Minott Sherman) in opposition to the view of the court, seems to us a satisfactory exposition of the law, and entirely conclusive. It is conceded that a man may deliver a deed by his agent, and the delivery will be good, if the agent have sufficient authority and pursues it.

But a man can not grant an authority to be executed after his death. Littleton's text is referred to, section 66, in which it is said, that if a man make a deed of feoffment, and a letter of attorney to deliver seisin, if livery of seisin be not executed in the life-time of him that made the deed, the deed is void, and the lands descend to the grantor's heirs; and also Coke Com. 526, that a letter of attorney to deliver seisin after the grantor's death, is void.

It is urged on the same reasoning as is used in the case be-

fore us, that the deed was not in the agent's hands as an escrow. "In every case of an escrow there is a contract and privity between the grantor and grantee; the person to whom the deed is delivered, is by mutual agreement the agent of both parties; he does not hold the deed subject to the control of the grantor; he has no power over, and can no more countermand the delivery of an escrow, than of an absolute deed. It is always in the power of the grantee to entitle himself to the deed, and to the estate by performing the stipulated condition. And when performed, the deed takes its whole effect by force of the first delivery without any new delivery." *Perryman's case*, 5 Co. 84, b. is referred to also. See also Com. Dig., tit. Fait, A, 3. In addition to the authorities relied upon by the chancellor in this case, other authorities (*Hawkins v. Bluett*,¹ 2 Esp. 663) are referred to, to show that to constitute a delivery, the donor must part, not only with the possession, but the dominion of the thing.

In opposition to this reasoning, it is said, in the opinion of the court: "The grantor delivered the deed to Wright, with a power to countermand it; but this makes no difference, for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power." That is to say, although the statute of that state, like ours, requires three witnesses to a will of real estate, yet by varying the form of the instrument, the testator might make a will attested by only two; and such manifestly would be the effect, if such a transaction could be sustained with us. Wills might, in effect, be made with two witnesses, or one witness, or without a witness.

In this case the witness with whom the instrument was deposited, and who best understood the donor's intentions, states that he held it as his agent, and would have delivered it upon his demand. That which is in the possession of a man's agent, is in his own possession; and can one be said to have delivered that which remains in his own possession? It is hardly necessary to say that if this purported to be a *donatio mortis causa*; and admitting that a *donatio mortis causa* may be made by deed, still the deed must be executed and delivered, so as to give the present dominion over the property, as in the case of any other deed.

The third ground is entirely misconceived. The objection is

1. *Hawkins v. Bluett*.

not that the instrument was defective, but that no instrument was ever executed at all, delivery being a part of execution.

The decree is affirmed.

DONATIO MORTIS CAUSA, ESSENTIALS OF: *Priester v. Priester*, 23 Am. Dec. 191; *Bradley v. Hunt*, Id. 597, and note 600.

DEED NOT DELIVERED WITHIN THE LIFE of the grantor. is inoperative: *Jones v. Jones*, 16 Id. 35 and note 39.

ROBINSON v. EXECUTORS OF DART.

[DUDLEY Eq. 128.]

WIFE HAS NO POWER TO DISPOSE OF or charge the estate settled to her separate use, even with consent of husband or trustee.

HUSBAND WILL NOT BE APPOINTED WIFE'S TRUSTEE, though the wife join in his petition that he be so appointed, and though he offer security for the return by him of the fund settled to her separate use, of which he seeks control.

WHERE ARTICLES ARE BEQUEATHED TO THE SEPARATE USE OF A WIFE, the use of which can be enjoyed only by having possession, such as articles of wearing apparel and furniture, she is entitled to their immediate possession.

A WIFE IS ENTITLED TO THE INCOME ONLY of stocks and moneys bequeathed to her separate use, though the will provides that her receipt for the property shall constitute a sufficient discharge to the executor.

EXECUTORS OF A WILL ARE TRUSTEES FOR THE WIFE of property bequeathed by it to her separate use.

BILL in equity. The will of Elizabeth Dart bequeathed to Susan Vance and Martha M. Robinson, a complainant herein, the residuum of her personal estate, consisting of furniture, wearing apparel, money, stocks, etc., to their separate use, and not to be subject to the debts, contracts, or control of their present or any future husbands; the separate receipts of these legatees to be a sufficient discharge to the executors. The executors under this will refused to pay over to Mrs. Robinson more than the interest on the stocks and money bequeathed to her. This bill was thereupon brought by Mrs. Robinson and her husband, in which they sought possession of the entire fund bequeathed, insisting that the wife's receipt for the same would discharge the executors. The husband offered to give ample security for the forthcoming of the fund at any time. The bill also prayed that the character of the fund be changed so that it might represent property of greater profit to the wife. The facts were not disputed, and the executors

submitted to the decision of the court, the question as to what were their duties. The bill was dismissed. Complainants appealed.

Bailey, Dawson, and Brewster, for the appellants.

Petigru, contra.

HARPER, Chancellor. No reasons for the decision in this case were given in the hearing below. No question was made with respect to the propriety of directing the executors (supposing them to be trustees) to permit the complainants to have the possession of the articles—of which it is supposed that the use can only be enjoyed by having the possession—such as wearing apparel and furniture. Nor is it apprehended that any difficulty will arise on the part of the executors. The bill is to have the stock or money paid over to the husband, either in his own right or as trustee for his wife.

With respect to the payment to the husband, in his own right, the English doctrine is relied on, as laid down in *Hume v. Tenant*, 1 Bro. Ch. 15,¹ and *Fettilplace v. Gorges*, 3 Id. 8, that a married woman is considered as a *feme-sole*, with respect to the disposal of her separate property; and as she may charge or dispose of it to any one else, it is supposed she may do so to her husband. But in this respect the English decisions seem to make an exception to the general doctrine. The case of *Griffith v. Hood*, 2 Ves. 452, seems very much in point to the present. There a bill was brought by husband and wife for property given to the separate use of the wife. It was said that the husband and wife's being joined, made it the husband's bill, and that the wife should have sued by *prochein ami*; but the court would secure the property to the separate use of the wife. It is plain that if the claim were by the wife, to have the property secured to her separate use, her claim is adversary to that of her husband, who ought to be made a defendant. In *Richards v. Chambers*, 10 Id. 580, the property was settled to the separate use of the wife, with power of appointment by deed or will; she executed an appointment in favor of her husband: husband and wife joined in a petition that the property might be paid over to him, and upon an examination *de bene esse* the wife expressed her willingness that it should be done. The subject was fully considered by the master of the rolls, and the petition dismissed. He observes, that it is not like the case in

1. *Hulme v. Tenant*, 1 Bro. Ch. 16.

which a husband has a right to the trust property of his wife, subject only to the obligation to make some provision for her before he reduces it into possession. The settlement, in that case, was made by the wife herself, before marriage; but it is observed, "that the interests are of such a nature that if created by a third person, he could have no power over them."

But certainly there can be no doubt in this state, since the decision in *Ewing v. Smith*, 3 Eq. 417, which has been followed ever since—that the wife has no power to charge or dispose of her separate property, even with the consent of her husband and trustee. The doctrine was recognized in *Patterson v. Magwood*,¹ 1 Hill Ch. 230; and it is equally improper that the fund should be paid over to the husband as trustee. In general, the appointment of a trustee is for the protection of the rights of the married woman against the husband. By constituting him a trustee, he is invested with the legal title, and might convey any property to a purchaser without notice; over money, his control would be absolute, even if he should give the most satisfactory security to answer for the capital. We are to recollect that the object of the donor was, that the wife should receive the issues and profits into her own hand, and enjoy and dispose of them for her own livelihood, or otherwise, as she might think proper. This object will almost certainly be defeated by constituting the husband trustee. He will be constantly tempted to use the authority and influence of a husband, to assume the disposal of the income, and induce his wife to acquiesce. If he should fail to pay over, is it likely that the wife would come into this court to call him to account; or ought the court to place her in such a situation in which circumstances may require her to do so? Where the husband obtains possession of property given to the separate use of his wife, this court makes him a trustee for the benefit of his wife; but he has never been constituted trustee for the purpose of enabling him to receive the property. In *Bennet v. Davis*, 2 P. Wms. 316, where land was given to the separate use of the wife, it was argued by the reporter that it differed from the case of a legacy. There the legal title was in the executors, who would not be compelled to assent. In *Rich v. Cockell*, 9 Ves. 369, where an administrator paid over to the husband property given to the separate use of the wife, it was said by the chancellor to be improvidently done. In this case the executors are certainly at present trustees for the complainant, Mrs. Robinson, and they may have a title to be relieved

1. *Magwood v. Johnston*.

from the trust by the appointment of another trustee, or upon a proper case made, the complainants may have another trustee appointed. But it will be time enough to consider of such an application when it is made; no application was made at the hearing for any inquiry as to the changing the mode of investment.

The decree is therefore affirmed.

EQUITY WILL NEVER APPOINT A HUSBAND trustee of a fund settled to the separate use of the wife, and if he is trustee of the fund, will relieve him of the trust whenever the matter comes under the observation of a court of equity: *Boykin v. Ciples*, 29 Am. Dec. 67.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

McLAIN v. STATE.

[10 YERGER, 241.]

SEPARATION OF THE JURY ON TRIAL OF A CRIMINAL CASE, caused by the absents themselves of some of the jurors from the remainder of the jury, after it had retired from court for the night, for the space of fifteen or twenty minutes, without their being in charge of an officer, will vitiate the verdict of conviction in the case and entitle the prisoner to a new trial, without its being required of him to show in addition to these facts that the jurors were, after their separation, tampered with.

INDICTMENT for murder. The opinion states the case.

W. Fitzgerald and J. Dunlap, for the plaintiff in error.

George S. Yerger, contra.

By Court, **TURLEY, J.** At the October term, 1836, of the circuit court of Weakley county, George McLain was convicted of the crime of murder in the first degree. During the progress of the trial, several bills of exceptions were filed for irregularity in conducting the same, and after the verdict had been returned, a motion was made for a new trial founded on the affidavits of John Clayton, one of the jurors, and Martin B. Brim. The affidavits of Clayton and Brim, show that after the jury were sworn and during the continuance of the trial which lasted several days, a part of the jury did very frequently of a night, after they had retired from the court, absent themselves from the balance of the jury without being under the charge of an officer, and remain absent for the space of fifteen or twenty minutes.

The principal question in this case is, whether the court be-

low erred in refusing to grant a new trial for the causes set forth in these affidavits. We think it did. The right of trial by jury, has always, in England and in this country, been considered of such vital importance to the security of the life, liberty, and property of the citizen, that great care has been taken to preserve it unimpaired. That the person accused may have the full benefit of a judgment by his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case, that no impression should be made to operate on them, except what is derived from the testimony given in court, and that they should continue impartial and unbiased. These objects can only be obtained by selecting those who have no preconceived opinion as to the guilt or innocence of the prisoner, and by not permitting them to separate from each other after they have been sworn, and mingle with the balance of the community. This was directed to be done in the case now under consideration, but was not complied with. The affidavits, which are uncontradicted, show conclusively, that several of the jury repeatedly separated from the others, without the care of the officer appointed by the court to attend them, and were absent for the space of fifteen or twenty minutes; long enough to have been tampered with if there had been any disposition to do so. It is not necessary for the prisoner to prove that they were, during their absence, subjected to improper influence from others; it is sufficient if they might have been. There would be no safety in a different rule of practice, for it would be almost impossible ever to bring direct proof of the fact that it was done.

This question has been fully examined by the general court of the state of Virginia, in the case of *The Commonwealth v. John McCall*,¹ 1 Va. Cas. 271. In that case the separation of the jury was not under more exceptionable circumstances, nor for a longer time than in this; neither was there proof of any actual tampering or conversation on the subject of the trial with the jurymen. The court held that it was not necessary that this should be proven in order that the verdict should be set aside and a new trial granted. This decision is, we think, supported by English authority. 1 Chit. Crim. L. 634.

The case of *The State v. Merrill Miller*,² determined by the supreme court of North Carolina at the June term, 1836, is referred to by the attorney-general as contradictory to this proposition. In that case the jury had been permitted to retire under

1. *Commonwealth v. McCaul*.

2. 1 Dev. & B. 500.

the custody of the sheriff. In a few minutes afterwards the sheriff returned with eleven of the jurors only, but the other juror returned in less than two minutes, and when the judge expressed his strong disapprobation of his conduct, excused himself by stating that he was obliged to step aside to obey the calls of nature. This was insisted upon as a cause for a new trial, which was refused by the court below. On an appeal to the supreme court, it was held by Ruffin, C. J., and Daniel, J., to be a reason for applying to the discretion of the judge in the court below for a new trial, and not to render the verdict a nullity and a *venire de novo* proper. But Gaston, J., dissented, and held that minor irregularities are grounds for new trials addressed to the discretion of the judge who presided at the trial, but that any unauthorized or unexplained separation of a juror from his fellows, in a capital case, in law vitiates the verdict, and a *venire facias de novo* should be awarded.

It is to be observed of this case, that under the circumstances in which the juror separated from his fellows, and the short period of time (viz., two minutes), which he remained absent from them, it was almost impossible that any undue influence could have been made to operate on him, and that therefore, this case stood very nearly as if there had been direct and positive proof that the juror during his absence had seen or conversed with no person whatever. Chief Justice Ruffin, in his opinion, says: "I can not think that an absence of a juror for two minutes from the body of the jury, without communicating with any person, as far as appears upon this or any other subject, does by itself annul the finding." If the absence had been for a period of time sufficiently long to have enabled persons to tamper with the juror, or to operate on his hopes or fears, would the judge have said the same thing? We apprehend not, for stress is laid upon the time, "two minutes."

But if the decision is to be considered as sustaining the proposition as broadly as has been contended for, to wit, that no unauthorized separation of a jury during the progress of the trial, will vitiate the verdict, unless there be proof of tampering with the jury, we can not recognize the authority of the case, especially as it is much weakened by the dissenting opinion of that able lawyer Judge Gaston. There are several other questions presented by this record which we consider unnecessary to examine, as the points already considered are decisive of the case. The judgment will be reversed and the cause remanded to Weakley county for a new trial.

Judgment reversed.

Cited to the point, that a prisoner showing a separation of the jury during the progress of his trial, has entitled himself *prima facie* to a new trial: *Stone v. State*, 4 Humph. 38; *Hines v. State*, 8 Id. 600; *Wesley v. State*, 11 Id. 503; *Wiley v. State*, 1 Swan, 256; *People v. Brannigan*, 21 Cal. 340. But if the prosecution shows affirmatively that the juror has not during his absence been tampered with and has not had communications respecting the trial, the necessity for a new trial will be done away with: *Hines v. State*, 8 Humph. 602. The principal case is cited in *Troxdale v. State*, 9 Id. 420; *People v. Plummer*, 9 Cal. 310, to the point that a prisoner is entitled to a new trial, if he can show that any of the jurors who tried him, sat with preconceived opinions as to his guilt. It is also cited in *Vaughn v. Dotson*, 2 Swan, 350.

SEPARATION OF THE JURY impaneled to try a criminal case, should not be allowed after the members thereof have been sworn, until their final discharge: *Nomague v. People*, 12 Am. Dec. 157. On the other hand it was held in *State v. McKee*, 21 Id. 499, that the jury might be permitted to separate, even in a capital case, where the trial has to be adjourned from day to day.

DEADERICK v. CANTRELL.

[10 YERGER, 263.]

TRUSTS, DISCRETIONARY AND DIRECTORY.—Trusts with respect to funds created by will for distribution at a future period, are either discretionary or directory. Discretionary, where no directions are given as to the manner in which the fund shall be invested prior to its final appropriation in satisfaction of the trust. Directory, where the manner in which the fund shall be invested is pointed out.

JOINT TRUSTEE OF A DISCRETIONARY TRUST is liable for the misapplication of the trust fund by his co-trustee, where it is through his instrumentality that the fund has been obtained by such co-trustee, or where the wasting of the fund has been enabled by some act of his amounting to gross negligence. Thus, where notes representing a trust fund were payable to two trustees jointly, the permitting by the one of the reception of their entire amount by the other, will render the former liable for the conduct of the latter.

JOINT TRUSTEE PERMITTING HIS CO-TRUSTEE TO RETAIN the trust fund for many years, without inquiry as to whether it has been invested so as to answer the purposes of the trust, will be liable, because of his neglect, for the conduct of his co-trustee.

JOINT TRUSTEE OF A DIRECTORY TRUST failing to see that the trust fund is invested in the manner pointed out, is liable for the abuse of the trust by his co-trustee.

BILL in equity. The opinion states the case.

R. J. Meigs, J. Campbell, and George S. Yerger, for the complainants.

F. B. Fogg, W. E. Anderson, and E. H. Ewing, contra.

By Court, **TURLEY, J.** This is a bill of complaint filed by the legatees of George M. Deaderick, for an account and decree

against Stephen Cantrell and Jesse Wharton, executors and trustees to the will of said George M. Deaderick, upon the following facts: Some time in the year 1816, G. M. Deaderick died in Davidson county, Tennessee, having previously to his death duly made and published his last will and testament, by which, after directing that all his debts be paid, and having appropriated to that purpose his personal estate and the rent of his lands, he provides, that his executors shall sell all his real estate at four equal annual installments, with interest from the date, the proceeds of which he bequeathed to the complainants separately in different proportions, some of them being specific legacies and others residuary, payable at the different periods when those entitled thereto should arrive at the age of twenty-one, or marry; in the mean time he directs his executors to loan out the money to the best advantage. This will was duly proven by Stephen Cantrell and Jesse Wharton, two of the executors named therein, who took upon themselves the burden of executing the same. In May, 1820, the said executors jointly proceeded to sell the real estate of the testator, and did sell and convey the same, upon a credit of one, two, three, and four years, taking notes with interest from the date, payable to themselves jointly. These notes Wharton permitted to remain in the hands of his co-trustee and executor, Stephen Cantrell, who collected the same as they fell due, and instead of loaning the money to the best advantage, as directed by the will, appropriated it to his own use for a series of more than ten or twelve years, at which period of time he failed entirely, leaving a deficit in the assets of said estate of many thousand dollars. Wharton received no part of the money, and does not appear to have paid any attention whatever to the execution of the duties imposed on him by the will after the sale of the lands, until it was understood that Cantrell had failed.

That Cantrell is liable for the amount of money and property used by him, is not disputed, indeed he has not appealed from the decree of the court below. Wharton's liability for the abuse of the trust by his co-trustee is disputed, and depends upon the following propositions:

1. Did he take upon himself the execution of the trust imposed by the will? That he did is too evident to admit of debate. He proved the will and joined in the sale and conveyance of the land, and assented to the notes being payable to himself and Cantrell. Having accepted the trust and partially executed it, he could not denude himself of it afterwards.

2. Was the trust abused? This proposition is also so clearly proved as not to have been denied. Stephen Cantrell, in violation of the directions of the will, which required the money to be loaned out to the best advantage, appropriated large amounts of it to his own use, for which he has never accounted.

3. Is Wharton responsible for this abuse of trust on the part of his co-trustee? Trusts of the character now under consideration are of two kinds, distinguishable by the law as discretionary and directory trusts, the rules for regulating the responsibilities of co-trustees, being different when applied to these different trusts.

We will proceed to examine: 1. When and under what circumstances a trustee is liable for an abuse of trust by his co-trustee, when the trust is discretionary; and 2. When and under what circumstances he is liable, where the trust is directory. A discretionary trust is, when by the terms of the trust no direction is given as to the manner in which the trust fund shall be vested, till the time arrives at which it is to be appropriated in satisfaction of the trust. In such cases in order to charge a trustee for an abuse by his co-trustee, some act of commission must be shown on his part, by which the trust fund was attained by his co-trustee, or some act of commission amounting to gross neglect, in permitting the fund to be wasted. In the case of *Monell v. Monell*, 5 Johns. Ch. 287 [9 Am. Dec. 298], Chancellor Kent, after an elaborate examination of the authorities on that point, says: "It may be laid down as a principle, that if two guardians or other trustees join in a receipt for money, it is *prima facie*, though not absolutely conclusive evidence that the money came to the hands of both; that one trustee may show by satisfactory proof that the joining in the receipt was necessary, or merely formal, and that the moneys in fact were paid to his companion; that without such satisfactory proof he must be liable to the *cestui que trust*; and that if the moneys were in fact paid to his companion, yet if they were so paid by his act, direction, or agreement, and when he had it in his power to have controlled or received the money, he is and ought to be responsible."

From this opinion we understand the chancellor to have held, that a trustee is liable for an abuse of trust by his co-trustee. 1. When the money has been received jointly. 2. When a joint receipt has been given, unless it be shown by satisfactory proof that the joining in the receipt was necessary or merely

formal, and that the money was in fact paid to his companion. 3. When the moneys were in fact paid to his companion, yet so paid by his act, direction, or agreement. Chancellor Kent is high authority, and we are satisfied to adopt his conclusions on the subject under consideration, without entering into an investigation of the decisions from which he extracted these principles—we think it would but incumber the opinion and be a useless consumption of time. It is admitted in the case under consideration, that the money was not jointly received, and that no joint receipt was executed, but it is contended that the money was paid to Cantrell by the act, direction, or agreement of Wharton, and under such circumstances as must make him liable for its waste, and we think successfully. This is not like ordinary cases of a fund outstanding, which has to be received by trustees, but it is a case in which property was devised to them to be sold, the notes of which were taken payable to both trustees. Upon the payment of the money no receipts were necessary, the notes were taken up by the makers, and being in the name of both, it seems to us, without so determining, constitutes as strong, if not a stronger case than that of a joint receipt. But we do not hesitate to say that the notes could not have gone exclusively into the hands of Cantrell, and the money been collected on them by him without the act, direction, and agreement of Wharton; in fact, the case agreed shows that the notes remained with his assent with Cantrell. In 2 Story's Commentaries on Equity, 524, it is laid down by that able jurist, "that if by any positive act, direction, or agreement of one joint executor, guardian, or trustee, the trust money is paid and comes into the hands of the other, when it might and should have been otherwise controlled or received by both, then each of them will be held chargeable for the whole." Again, in note 1, p. 525, he says, "if a receipt be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, both shall be charged."

The true question in all such cases is, whether the money was under the control of both. Now the money must of necessity be in the hands of one or the other, as it can not be in both at the same time. What then is meant by its being under the control of both? Manifestly where it has been received by the act or consent of both. If one receive money outstanding without consulting the other, inasmuch as he had a right to do so, the other shall not be charged, but when a debt is due by note

to both, one can not receive it against the assent of the other, it being a debt due to them jointly, and for which they may sue as individuals, and the fund, when collected, would be held in trust. But if the fund was not collected in such a manner as to charge Wharton with his co-trustee's default, has not his negligence in attending to the execution of the trust made him so chargeable. At page 525 of 2 Story Commentaries, it is said, if one trustee wrongfully permit the others to detain the trust fund a long time in his own hands without security, he will be deemed liable for any loss. Where trustees voluntarily permitted a co-trustee to receive purchase money, and retained it a considerable time without calling for it, contrary to the trust, they were charged with the loss occasioned by their co-trustee: *Bone v. Cooke*, McClel. 168, and cases there referred to. This principle is consonant with justice. Two trustees are appointed to execute a trust, the final operation of which is not to be completed for years; they undertake to execute it, they are intended as checks on each other, have an equal control over the fund, are mutually bound to attend to the interest of the trust, and shall one of them be permitted to go to sleep and trust everything to the management of his co-trustee, and when in the course of ten or fifteen years the fund having been wasted, and his co-trustee insolvent, he is called upon to make it good, shall he be heard to say that he had implicit confidence in his companion, and permitted him to retain all the money, and appropriate it as he pleased, and that he ought not therefore to be charged? Surely not; it is neither law nor reason. This is what Wharton did, and this is his excuse and reason why he should not be made liable for the act of his co-trustee. We therefore think, that if this were a discretionary trust, Wharton is bound to make good the losses occasioned by Cantrell.

But this is not a discretionary, but a directory trust. A directory trust is when, by the terms of the trust, the fund is directed to be vested in a particular manner, till the period arrives at which it is to be appropriated. In such cases, if the fund be not vested, or vested in a different manner from that pointed out, it is an abuse of trust for which both trustees are responsible, though but one received the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created: *Bone v. Cooke*, McClel. 168; *Ringgold v. Ringgold*, Har. & G. 12 [18 Am. Dec. 250]; 8 Bro. Ch. 90,¹ 112;² *Oliver v. Court*, 3 Exch. 312;³ 4 Cond. Ch.

1. *Scarfield v. Howe*.

2. *Koble v. Thompson*.

3. 3 Price, 127.

93; *Brice v. Stokes*, 11 Ves. 326. These cases so fully establish the principle above laid down, that it is useless to comment further upon it; it fixes the liability of Wharton beyond controversy. The fund never was vested in pursuance of the directions of the will, but was wasted by Cantrell. We therefore affirm the decree of the chancellor, so far as it makes Wharton liable for the defalcation of Cantrell, but see no reason for charging him with compound interest, and reverse the decree thus far, and direct an account which shall charge him with simple interest on annual balances.

Decree affirmed.

Cited to the point that where there are several trustees of a directory trust, within the definition of the principal case, each one who has entered upon the execution of the trust is liable for the misapplication of the trust fund by any of the others: *Thomas v. Scruggs*, 10 Yerg. 405; *McMurray v. Montgomery*, 2 Swan, 377. It is also cited to the effect that the trustee who has enabled or allowed his co-trustee to obtain the entire trust fund is liable for his acts with respect thereto: *Porter v. Moores*, 4 Heisk. 25; *Hughlett v. Hughlett*, 5 Humph. 474. The principal case is also cited in *Fulton v. Davidson*, 3 Heisk. 629.

TRUSTEE WHO HAS FAILED IN THE EXERCISE OF A PROPER DEGREE of watchfulness over the conduct of his co-trustee, and has neglected to have parts of the trust fund in the hands of the latter applied in discharge of the trust, will be liable together with the latter for the loss that has been thereby occasioned: *Ringgold v. Ringgold*, 18 Am. Dec. 250. See also *Johnson v. Johnson*, 29 Id. 72.

DAVIS v. RICHARDSON.

[10 YERGER, 290.]

GIFT OR BEQUEST OF PERSONAL PROPERTY FOR LIFE, with unlimited power of disposition superadded, creates an absolute interest.

ESTATE IN REMAINDER IN THE PERSONAL PROPERTY THAT SHALL BE LEFT at the determination of a life estate, the tenant of which enjoys an absolute power of disposal, is void.

BILL in equity. The case appears from the opinion.

Frierson, for the complainant.

G. J. Pillow, contra.

By Court, TURLEY, J. The question for the consideration of the court in this case, arises out of the construction of the will of Thomas Richardson, deceased, the fourth clause of which, is in the words following: "I give my dearly beloved wife, Jane Richardson, all and singular, my personal property, credits, household furniture, my stock of all kinds, by her fully

and freely to be disposed of and enjoyed during her natural life or widowhood." The fifth clause is in the words following: "At her death or marriage, if there shall be any property left, Jenny, Huldah, Frances, and Lovey, shall have each of them a feather bed and ten dollars, and if there shall be as much, my six daughters shall have forty dollars each, before there is a general division; but after they have gotten forty dollars each, if there should be anything left, that shall be divided equally among all my children." Did the testator intend by this will to vest in his wife an estate for life only, or did he intend that she should have the power during her lifetime to sell and dispose of the same, and if any should be undisposed of at her death, that the same should descend to those further provided for in his will?

That his intention was to give his wife an unrestricted right to dispose of and use the property in any way she might think proper, untrammelled by the claims of others, is we think evident. The words "and to be freely disposed of and enjoyed," certainly can mean nothing less than that she may exercise her own judgment as to the most effectual mode of making the property useful to herself. If she think proper to keep it and live upon the income arising from it, she may do so; if she think proper to sell and spend it, she may likewise do so; and that the testator anticipated that the latter course might be pursued, is evident from the fact of his only disposing of what might be left of the legacy after the death of his wife. The legacy was a valuable one, and yet when he comes to make provision for any unexpended remainder he says, "if there shall be any property left," three of his daughters are to have a feather bed each, and ten dollars in money, and if there shall be as much, his six daughters shall have forty dollars each, then if there be anything left it shall be equally divided, etc. Now if he had not intended to give his wife an absolute interest in the property, with unlimited power of disposal, he could have had no doubt as to the amount which would have been left at her death, but he supposed that she might not spend it all, and thought he could provide by his will for the disposal of the remainder. That a gift or devise of personal property for life, with an unlimited power of disposal, conveys an absolute right thereto, can not now be disputed. The question has been elaborately investigated by this court in the case of *John Smith T. v. Robert Bell and Wife*, Mart. & Y. 302[17 Am. Dec. 798], and in the case of *David et al. v. Bridgeman et al.*, 2 Yerg. 558,

and so decided—further investigation would be useless. We therefore think that the complainant has no interest whatever in the property sued for, and reverse the decree of the chancellor and dismiss the bill.

Decree reversed.

Cited to the point that an absolute power of disposal conferred upon a tenant of a life estate in personal property gives him an absolute interest therein: *Thompson v. McKisick*, 3 Humph. 635; *Booker v. Booker*, 5 Id. 513; *Knuckolls v. Lea*, 10 Id. 593; *Williams v. Jones*, 2 Swan, 624; *Bean v. Myers*, 1 Coldw. 228. But if an estate is given for life with a limited or special power of disposition or appointment, and in case of failure thereof, then remainder over, the remainder is good: *Knuckolls v. Lea*, 10 Humph. 594.

REMAINDER IN PERSONAL ESTATE, after the determination of a life estate, the tenant of which enjoys an absolute power of disposal, is void: *Smith v. Bell*, 17 Am. Dec. 798.

WATKINS v. DEAN.

[10 YERGER, 820.]

INSTRUMENT, IN FORM A DEED, IS A WILL, where the property that it purports to convey is an undivided interest in that of which the grantor shall die seised.

BILL in equity. The opinion states the case.

R. J. Meigs, for the complainants.

S. Laughlin, for the heirs of Michael Dean.

J. Campbell, for the widow of Michael Dean.

By Court, GREEN, J. On the sixth of November, 1833, Michael Dean, of Warren county, executed a paper writing, which he calls an indenture, to Eleanor and Mary Jane Watkins, in which he recites that they are the children of Hannah Watkins, wife of Henry Watkins, who is his natural daughter; that he is far advanced in life, and has no legitimate children, and has considerable property, real and personal; and for the purpose of making provision for his said daughter during her life, and for her children after her death, he “doth give, grant, convey, and enfeoff, set over, alien, and confirm, and by these presents he, the said party of the first part, does, for the purposes and considerations aforesaid, give, grant, set over, alien, enfeoff, confirm, and convey to the said parties of the second part, to have and to hold to them, their heirs, and assigns, one equal moiety or equal half of all the property that he, the said party of the first part, may die seised or possessed of, whether in law or equity, or in possession, or

in action, including all lands, tenements, and hereditaments of what description soever, and also all negro slaves of what description soever, whether in possession or action. And also all moneys that he may be possessed of, or may be due him from any source whatsoever, and also one equal half of all the live stock of what description soever, that he may die seised or possessed of; and also one half of everything of what nature soever that he may die possessed of, or that may be due him in any way whatever, at the time of his death, to have and to hold to them, the parties of the second part, their heirs and assigns for ever." He then stipulates that the property is to be held in trust for the exclusive support and maintenance of the said Hannah, during her natural life; and upon the further trust, that every other child born of the body of said Hannah should have an equal portion of said property with said Eleanor and Mary Jane, at the death of said Hannah, when it was to be equally divided among all her children. The instrument was acknowledged before the clerk of the chancery court at McMinnville, the same day it was executed, and on the twenty-second of July, 1834, it was registered in Warren county.

In 1835, Michael Dean died, intestate, and administration of his estate was granted to the defendant, Lucy, his widow. Mrs. Watkins and her children, by their next friend, Henry Watkins, bring this bill to have partition of the real, and distribution of the personal estate.

1. The first question arises upon the construction of this paper. Can it take effect as a deed, or must it be regarded as testamentary in its character? A deed must take effect *in præsentia*: 2 Kent Com. 438. But this instrument, by its terms, was to take effect at the death of Michael Dean. It does not purport to convey any property of which he was the owner at its date, but gives the one half of all the property of which he may die seised and possessed. It is most clear, therefore, that it could not pass to the donees, any property owned by the old man at its date. As therefore it was to take effect only at the death of Michael Dean, it is a will, and not a deed: Rob. on Wills, 145. Viewing it as a will, it is not executed so as to pass land, not being subscribed and attested by two witnesses. The complainants are therefore entitled to one half of the personal property only.

2. The defendant Lucy, the widow of Michael Dean, treating the aforesaid instrument as a testamentary paper, prays leave to dissent from it, and claims one half the estate under the act of 1827, c. 14.

The widow has a right to dissent, and claim the provision the law makes in such cases. But we do not think she can take the one half under the act of 1827. That act provides, that where a man may die intestate, and without child or children, his widow shall be entitled to one half his estate. It means, what its words obviously import, not that the widow by dissenting from his will, under the act of 1784, c. 22, thereby creates, as to her, an intestacy under the act of 1827. The latter act intended to give her the one half in one case only, where the husband, having no child, had not made any disposition by will of his estate, but it did not intend to prevent him from giving it, as before, to whomsoever he might choose, or to enlarge the rights of the widow, in case he made a will, beyond the provisions of the act of 1784. If the construction contended for were correct, the same result would follow a dying with or without a will, and the use of the word intestate would be wholly unnecessary and senseless. But it is manifest the legislature intended the word intestate to be operative and to have effect, which it would not do, if the construction contended for were sanctioned by the court. The widow in this case is only entitled to dower in the land, and to one third part of the personal estate.

The other defendants, heirs at law of Michael Dean, are entitled to the balance of the estate, consisting of two thirds of the land and one sixth of the personal estate. Affirm the decree.

Decree affirmed.

Cited to the point that an instrument purporting to convey, not any portion of what the maker then owns, but a portion of that of which he shall die seized, is not a deed, but a will: *Walls v. Ward*, 2 Swan, 654; *Swails v. Bushart*, 4 Head, 564. But if the instrument purports a conveyance of an estate in property which the maker then owns, to take effect at the latter's death, it is a deed: See cases last cited. The principal case is also cited in *Turner v. Fisher*, 4 Sneed, 211.

INSTRUMENT, IN FORM A DEED, CONSIDERED A WILL, WHEN: *Gilmore v. Whitesides*, ante, 563.

KIMBRO v. LYTLE.

[10 YERGER, 417.]

ACCOMMODATION INDORSER who indorses for the purpose of enabling the maker of the paper to sustain his credit, and to enable him to aid himself in his business, is liable to a holder who receives the paper as security for a pre-existing liability.

NOTE IS RECEIVED IN DUE COURSE OF TRADE where the holder has given for it money, goods, or credit, or has sustained on its account some loss or incurred some liability.

ACTION upon a promissory note, executed by Cantrell & Allen and indorsed by Lytle, the payee, and Deaderick, the present defendants. Cantrell & Allen became insolvent before the note fell due, and it was in consequence dishonored. Steps were taken to fix the liability of the indorsers, and this suit was brought. At the time that the note was given, Kimbro was indorser for Cantrell & Allen on two notes, one for three thousand dollars, and one for one thousand five hundred dollars, the latter being payable to Shute. When this last note became due, Shute was willing to renew it, upon the condition that Kimbro should indorse the renewed note. Kimbro consented to this upon the condition, amongst others, that a note be given him to protect him from his liability upon the three thousand dollar note. Cantrell & Allen thereupon executed, upon a sheet indorsed in blank by Lytle, a note payable to the latter's order, procured it to be indorsed by Deaderick, and delivered it to Kimbro. Kimbro thereupon indorsed Cantrell & Allen's note to Shute. Kimbro was afterwards obliged to take up the three thousand dollar note, to secure him against which the present note was given. It appeared from the evidence that Lytle was the general accommodation indorser for Cantrell & Allen, and was accustomed to leave them such blank indorsements as the one upon the present note, to be used by them in the course of their business. Under the instructions of the court the jury found for plaintiff, and judgment followed. Plaintiff appealed.

J. Campbell and F. B. Fogg, for the plaintiff.

J. S. Yerger, contra.

By Court, REESE, J. We consider the present case as submitting to our determination this general question, is one who becomes indorser upon a note for the accommodation of the maker, with a view to aid him in his business and to sustain his credit, and without inquiry or restriction as to the use to be made of it, liable to a holder, who received it from the maker as a security for existing liabilities? This question is answered in the affirmative by the present chancellor of New York, in the case of *Grandin v. Le Roy*, 2 Paige Ch. 510, in which he says, that if the complainants in the case "lent to F. their indorsement without any restriction as to the manner in which it was to be used and without any inquiry, he had a right

to use it in the way he had done, to pay or secure an antecedent debt, or to sustain his credit in any other way which was not illegal."

The chancellor in that case did not think that "the facts raised the question, whether an accommodation note made and indorsed for a particular purpose, and afterwards negotiated for another purpose to a third person with notice, or in payment or security for an antecedent debt, can be recovered against the indorser." The chancellor to sustain the principle, determined in this case, refers to the cases of the *Bank of Rutland v. Buck*, 5 Wend. 66, and the *Bank of Chenango v. Hyde*, 4 Cow. 566. In the former of those cases, the note was made by Spear and Everett, and signed by Buck as surety, payable to the bank; it was made to enable Spear and Everett to raise money for their own accommodation. Upon its being offered at the bank for discount, the bank refused to discount it, and it was subsequently and before it was due, delivered over to Honse and others, as collateral security for the payment of a judgment in their favor against Spear and Everett. The suit was brought in the name of the bank, but for the use of Honse and others. It was objected that the object for which the note was made, being to raise money from the bank, and that object having failed, it ought to have been returned to the surety. It was admitted, that if the bank refused to advance the money, and a third person had done so, as in the case of the *Bank of Chenango v. Hyde*, 4 Cow. 567, the surety would have been bound, as the substantial object, the raising of money, would have been obtained. It was further objected, that the note was not received in the ordinary course of commercial business, and so as to be governed by the law merchant. But Chief Justice Savage, delivering the opinion of the court, says: "I can see no well-formed objection to a recovery upon this note. It was drawn for the purpose of raising money for the accommodation of the two makers, Spear & Everett, who have had the benefit of it." He relies upon the case of *Powell v. Waters*, 17 Johns. 176, and *Chenango Bank v. Hyde*, as sustaining the case, and distinguishes it from the case of *Woodhall v. Holman*,¹ 10 Id. 231; and the case of *Skelding v. Hoight*,² 15 Id. 274, upon the ground that a fraud was committed in putting the note in circulation in those cases;" and he adds, "here had the plaintiffs obtained a discount at the bank, they might have paid the money to Honse & Co., and Buck's liability would

1. *Woodhall v. Holmes*.2. *Skelding v. Warren*.

have been the same; his situation is not changed, nor is there any fraud."

Without further citation of cases, we think that upon the authority of the two cases above referred to, and those relied on to sustain them, so consonant to reason and to the objects and principles of commercial law, we too may answer the question with which this opinion commences, in the affirmative.

It is not denied, indeed it is admitted, that one who becomes indorser of a note for the accommodation of the maker, in the conduct of his business and to sustain his credit, without restriction or inquiry as to the use of the note, would be liable to the holder, who might receive it in payment of existing debts, or as a security for existing liabilities, if he had assented to such use of it. But does he not assent to this or any other use of it, lawful and necessary to the accommodation and credit of the maker, when he indorses it for his benefit generally, and without reference to any end more special, than that with it he might raise money to sustain credit? We certainly think him as much bound as if he had given his express assent. In this case, as in that of the *Bank of Rutland v. Buck*, it may be remarked, that if the money had been raised upon the note indorsed by Lytle, and the responsibility of Kimbro to Ensley extinguished by means of it, the liability of Lytle would have been just the same. His situation would not have been changed.

But it is contended that where one indorses a note for the general credit and accommodation of the maker, without restriction as to the purpose for which it may be used, still there is a restriction arising from the operation of the law merchant, which limits the responsibility of such indorser to the claim upon him of that holder only, who has received the note in the due course of commercial transactions; that is, in other words, who has given his money for it, his goods, or his credit, at the time of receiving it, or who then on account of it, sustained some loss or incurred some liability. To sustain this position much elaborate argument has been used, and many authorities insisted upon as relevant have been cited. We deem none of them as resting upon grounds which will sustain the purpose for which they are relied on. They are of that class, where the note having been stolen or found, or fraudulently obtained, or fraudulently put into circulation, and the holder, innocent though he may have been, has received it, not in due course of trade as above explained, but as payment or pledge for a pre-existing debt or liability.

Such was the great case of *Bay v. Coddington*, 20 Johns. 637 [9 Am. Dec. 268] so fully discussed and so well considered, which has carried the restrictions upon the negotiability of commercial paper to a point, where this court is willing to carry it and where it is disposed to leave it. Such also are the subsequent cases of *Wardell v. Honell*,¹ 9 Wend. 170; *Rose v. Brotherson*,² 10 Id. 85; *Kosson v. Smith*, 8 Id. 637;³ *Clovell v. The Tradesman's Bank*,⁴ 1 Paige, 131. In these cases, in general, there was some equity as between the original parties, arising upon the ground of fraud or other cause, which stood in the way of the holder, in collecting the note, because he had not received it in the due course of trade. But in this case as between the makers and the holder, the note was valid and founded on good consideration, and what equity, as it has been called, against the plaintiff, has Lytle, who indorsed the note for the credit of the makers to sustain them in their business, without inquiry or restriction as to its use, because they chose to give it to the plaintiff to secure him for his responsibilities in their behalf? We think he is not in the attitude in this transaction to enable him to resist the claim of the plaintiff, and thinking so on the general ground which we have stated, it is not necessary to look into the agreement between the makers of the note and the plaintiff, touching the indorsement by the latter of Shute's note, for the purpose of inquiring whether the plaintiff did not at the time of receiving the note sued on, give for it his credit and incurred a new liability.

Upon the whole, we think that the judgment of the circuit court is erroneous, that it must be reversed, and a new trial of the cause be had, when the law will be charged conformably to this opinion.

Judgment reversed.

Cited to the point that an indorser, indorsing for the purpose of aiding the maker of a note in his business, is liable to a holder who has received it as security for pre-existing liabilities: *Kirkman v. Bank of America*, 2 Coldw. 407; *Perkins v. Ament*, 2 Head, 114. That a note is received in due course of trade where the holder has given for it his money, goods, or credit, at the time of receiving it, or has on account of it sustained some loss or incurred some liability: *Nichol v. Bate*, 10 Yerg. 433; *Wormley v. Lowry*, 1 Humph. 470; *Gooch v. Massey*, 4 Id. 376.

That where notes have been fraudulently put in circulation, the holder can not recover unless he has received them in due course of trade: *Nichol v. Bate*, 10 Yerg. 432; *Van Wyck v. Norvell*, 2 Humph. 195. The principal case is also cited: *Grissam v. Fite*, 1 Head, 335.

1. *Wardell v. Howell*.

2. *Rosa v. Brotherson*.

3. *Kosson v. Smith*, 8 Wend. 437.

4. *Covell v. Tradesman's Bank*.

CARNEY v. CARNEY.

[10 YERGER, 491.]

EXECUTION DEFENDANT PRESENT AT THE SALE OF HIS PROPERTY failing to object to it because he has not received the notice to which he is entitled by statute, is not precluded by that fact from raising the objection of want of notice, in a subsequent proceeding.

The case appears from the opinion.

W. Thompson, for the plaintiff in error.

George S. Yerger, contra.

By Court, GREEN, J. We have not thought it necessary to notice several of the questions which have been made in the argument of this case. We think the court erred in that part of the charge in which the judge says, "that if the defendant in the execution, who resided on the land, did not have twenty days' notice in writing, but was present and knew of the sale, and did not object to it, but permitted it to go on without claiming the twenty days' notice in writing from the sheriff, and without notifying the persons whom he saw bidding for it, that he had not had such notice, that he was bound by it, and that the sale was not void on that account."

This is going much farther in making the act of the party evidence that he had received the twenty days' notice required by the act of 1799, c. 14, sec. 1, than the opinion of this court, in the case of *Noe v. Purchapile*, 5 Yerg. 216, warrants. In the conclusion of the opinion in that case, the court says: "The defendant by his conduct assisted in making the sale, stood by at the time, and had an understanding with the purchaser for his benefit. All this amounts to a waiver of notice."

We approve the decision in that case, and think that in all cases where the defendant is present, assisting at the sale, or by other act, evinces his willingness that it should go on, it is a waiver of the notice required by the act, or evidence that such notice was actually given. In such case, the party by his acts would show that he possessed all the knowledge he wished, or that would be useful to him. As the notice required by law is for his benefit, he may waive his right to require it. And if he should do so, either by express words or by acts equivalent thereto, he shall not afterwards be heard to say he had not the notice required by law. But to say, that if the defendant in an execution is present at the sale of his land, and does not object to it, and notify the bidders that he has not had the notice, he

shall be bound by his silence, and shall not afterwards object to the sale for want of the notice, is going too far. It is enough, in my opinion, to hold the sale valid, if he shall actually promote it, or consent that it may be made—his mere silence is not sufficient. Reverse the judgment and remand the cause.

Judgment reversed.

Cited to the point that a debtor upon whom no notice of an execution sale has been served, who is present at the sale, and raises no objection, yet does not waive his right to notice: *Richards v. Meeks*, 11 Humph. 456; *Hinson v. Hinson*, 5 Sneed, 324.

MAHALA v. STATE.

[10 YERGER, 532.]

DISCHARGE OF THE JURY IN A CRIMINAL CASE, without legal justification for the act, entitles the prisoner to a discharge, as if acquitted.

RIGHT TO DISCHARGE JURY IN A CRIMINAL CASE without the consent of the prisoner, exists only in cases of necessity, which may be classed under the following heads: 1. Where the court is compelled by law to adjourn before the jury can agree upon a verdict; 2. Where the prisoner's misconduct places it without the power of the jury to examine his case correctly; 3. Where no possibility exists that the jury will agree upon a verdict.

IMPOSSIBILITY OF AGREEMENT UPON A VERDICT to justify the discharge of the jury, must be an impossibility founded upon some physical cause, such as sickness or insanity of a juror, or exhaustion of the jury; but that they can not bring their minds to an agreement will not justify their discharge. Thus, the discharge at half-past nine Friday morning of a jury to whom the case had been submitted at two o'clock P. M. the previous day, because they are unable to agree upon a verdict, will entitle the prisoner to his discharge.

INDICTMENT for murder. At a former trial of the prisoner a jury had been impaneled on Wednesday. On Thursday, at two P. M., the case was submitted to them. On Friday morning at half-past nine they were discharged, having previously several times come into court, and assured the court that they could by no possibility agree upon a verdict. On Saturday the court adjourned. At this trial the prisoner was convicted. A writ of error was thereupon prosecuted in her behalf.

W. Thompson, for the plaintiff in error.

George S. Yerger, contra.

By Court, **TURLEY, J.** The right of trial by jury has always been regarded by the English and American jurists as one of the most sacred principles of the law, one to which the citizen

is more deeply indebted than to any other for that security to life, liberty, and property guaranteed in Great Britain and the United States to an extent unknown in other countries, and the preservation of which, in its purity and independence, has at all times been guarded with a most watchful and jealous eye. Therefore it is, that an attempt, whenever made by the courts, to interfere with the privileges of a jury, and endanger their independence, and the consequent security of the subject, has at all times been promptly resisted, and though, occasionally, in times of great political excitement in England, it may have succeeded for the day, yet to the honor of the legal profession, the usurpation has always been rebuked, and the proper balance of power between the court and the jury quickly restored. It is a well-understood maxim of our law, that the judges are to expound the law, and the jury to ascertain the facts, neither of which has the power to interfere with the province of the other. The jury, in their deliberations upon the facts, are as independent of the court, as the judge, in determining the law, is of the jury; and the consequence is, that when a case has been submitted to a jury, there it must remain until it has been decided by them, or is withdrawn from their consideration, not at the will and pleasure of the court, but under circumstances justified by the law. In the case now presented for the consideration of this court, the jury returned no verdict, and the case was taken from their consideration, and they discharged against the consent of the prisoner. And the question is, whether, under the circumstances, this was not an illegal exercise of power on the part of the court below, and the prisoner, of consequence, entitled to her discharge? This is a question of much importance, and although it has not, perhaps, been directly settled by adjudicated cases in this state, we feel much relieved in the conviction, that it is well settled both by principle and authority in England, and a very respectable portion of the states of this union. Lord Coke, in his 1 Inst. 227 b, and 3 Id. 100, lays it down as a general rule, that a jury sworn and charged by the court in cases affecting life or member can not be discharged by the court, or any other, but they ought to give their verdict.

This doctrine upon the authority of Coke, was afterwards engrafted by Hawkins and Blackstone into their elementary treatise on the criminal law. And although this principle was controverted in the case of *Ferras*, cited in Sir Thomas Raymond, 84, and in a case of larceny reported in 1 Vent. 69, and one re-

ported in Salk. 646; yet it can not be said to have been fully examined and completely overruled, until the decision of the case of the two *Kinlocks*, reported in Foster from page 22 to 40, when it was considered by all the judges but one that the general rule laid down by Lord Coke had no authority to warrant it, and could not be universally binding; but, that there were exceptions to it, and in that case determined that the court had power to discharge a jury at the request of the prisoners, assisted by able counsel, and with the intent of imparting to them a privilege which they could not otherwise have enjoyed. Since that decision it has not been doubted that the courts have the power to discharge juries without their rendering a verdict, but only as we think in cases of manifest necessity. All the cases of exception (to the general rule as laid down by Lord Coke), specified in the elaborate opinion of Mr. Justice Foster in the case of the *Kinlocks*, are cases of necessity, and there is no authority to be found in the English books which sustains the position, that a jury may be discharged in a criminal case without the consent of the prisoner, but from necessity. Such also, we think, has been the train of the decisions in the United States.

In the case of *The People v. Goodwin*, 18 Johns. 187 [9 Am. Dec. 203], Judge Spencer, in delivering the opinion of the court, says: "Upon full consideration, I am of opinion, that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necessity." In the case of the *United States v. Coolridge*, Gall.¹ 364, Justice Story says "that the power to discharge a jury in capital cases should only be exercised in very extraordinary and striking circumstances." In the case of the *United States v. Haskell and Francois*, 4 Wash. 411, Judge Washington says, "that a court is fully authorized to discharge a jury in cases of necessity, in capital cases as well as misdemeanors."

In the case of the *United States v. Perez*, 9 Wheat. 579, Judge Story, in delivering the opinion of the court, says: "We think that in all cases the law has invested courts with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstance into consideration, there is a manifest necessity for the act, or the ends of public justice would be defeated; but that the power ought to be used with the greatest caution under urgent circumstances, and for very

1. 2 Gall.

plain and obvious causes, and in capital cases especially the court should be extremely careful how they interfere with any of the chances of life in favor of the prisoner." In the case of *The People v. Barrett*,¹ Livingston, judge, says: "Without denying the right of courts to withdraw a juror, in criminal cases, and put the defendant on his trial a second time, it is evident this power should not be lightly used, but confined as much as may be to cases of urgent necessity, when, by the act of God, or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public or to the defendant himself." These decisions made by the first tribunals of the country, completely sustain the position that the power to discharge a jury, without a verdict, is not the exercise of an arbitrary discretion, but an extremely delicate duty, only to be performed in cases of urgent necessity.

This brings us to the examination of what constitutes this necessity. We are of opinion that the causes which create this necessity may be classed under three heads: 1. Where the court is compelled by law to be adjourned before the jury can agree upon a verdict; 2. Where the prisoner, by his own misconduct, places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the state, or is himself, by the visitation of providence, prevented from being able to attend to his trial; and, 3. Where there is no possibility for the jury to agree upon and return a verdict.

It is upon the last of these propositions that the question in the case under consideration arises. The jury were impaneled on Thursday evening, at two o'clock, and were discharged at nine o'clock on Friday morning, because they could not agree upon a verdict, the court continuing its session until some time on the Saturday following. Now, the question is, was this such a case of necessity as justified the court in discharging the jury? A jury may not be able to agree upon a verdict for many reasons, such as sickness or insanity of one or more of the jurors, exhaustion of the jury before they have been able to come to a decision of the case, the absconding of one of the jurors, without the consent of the court. These are cases put in the books, and with others of like character, constitute what we will distinguish as cases of physical impossibility. A jury may also not be able to agree because their minds can not come to the same conclusion from the facts submitted to their consideration. This, we would consider as a case of moral impos-

1. 2 Cal. 304; S. C., 2 Am. Dec. 239.

sibility; and we are called upon to say whether it constitutes a necessity for the discharge of a jury before the time arrives when the court must adjourn. We think it does not. In the case of the *Kinlocks*, Mr. Justice Foster enumerates many cases in which from necessity a jury may be discharged, and never once intimates that it may be done merely because they could not bring their minds to concur in the same opinion. It can not be possible that he should have neglected doing so if in his opinion it had constituted a case of necessity, for it would be so palpable a course for the exercise of this delicate power, and would be of such frequent occurrence, that no judge could overlook it in enumerating the causes for which a jury might be discharged from rendering a verdict. Indeed, it is almost manifest that Mr. Foster was of opinion that it did not constitute a case of necessity, for in commenting upon *Mansel's case*, he says, "the truth of the case was no more than this, the jury were not agreed on any verdict at all, and therefore nothing remained to be done by the court but to send them back and keep them together until they should agree to such a verdict as the court could have received and recorded."

There is no English decision then sustaining the position that the court has the power to discharge a jury because they can not agree upon a verdict, unless there be some physical impossibility connected with it, and so we think is the spirit of all the American authorities when properly understood.

In the cases of *The Commonwealth v. Cook et al.*, 6 Serg. & R. 577 [9 Am. Dec. 465], and *The Commonwealth v. Clue*, 3 Rawle, 498, the supreme court of Pennsylvania have decided that an inability of the jury to agree is no ground for discharging them, and in *Haskell and Francois' case*, 4 Wash. 411, Judge Washington says he entirely concurs with the supreme court of Pennsylvania, in the opinion in *Cook's case*, 6 Serg. & R., that the court ought not to discharge a jury merely upon the ground that they say they can not agree, however positive the declaration may be. These cases are of very high authority, and we consider the reasoning satisfactory.

But it is said that they are contradicted by the decisions of the supreme court of the United States and other states of the union. We will briefly examine the cases referred to by the attorney-general for the support of this assertion. The first case is that of the *United States v. Perez*, 9 Wheat. 579. The facts of this case as stated in Wheeler's Criminal Cases are very strong, and if the supreme court of the United States had de-

terminated that they constituted a case of necessity, there would have been no way of reconciling the case with the Pennsylvania decisions. This was a case of piracy, and the jury were discharged in less than four hours; surely no one can doubt that it was a rash and hasty exercise of power on the part of the circuit court. Upon the propriety of it, the judges were divided in opinion, and the case was certified to the supreme court of the United States, when the case was determined, not upon the ground that the facts constituted a case of necessity in the opinion of the supreme court, but because, as Judge Story says, the court below had the power to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oaths of office; or in other words, the exercise of the power to discharge, being an act of discretion, it must rest with the court below, and that the supreme court will not reverse it. In our opinion, this decision does not conflict with the cases in Pennsylvania.

The next case we will examine, is that of the *Commonwealth v. John Bowden*, 9 Mass. 494; there a jury was discharged after being out a part of a day and a whole night, and it was held by the court not to be a discharge of the prisoner—this was a case of highway robbery. The question does not appear to have been elaborately investigated, for so far as we can judge from the argument of the counsel for the prisoner, it turned upon the point of whether the court had power, under any circumstances, to discharge a jury without the consent of the prisoner, for the argument was, that in a capital case the jury could not be discharged with the consent of the prisoner, nor in any criminal case without such consent. The court say, that the strictness of the law upon this subject has very much abated in the English courts, and that it would not be consistent with the genius of our government to use compulsory means to effect an agreement among jurors. So that it seems to us, that the question, as to whether a necessity for the discharge of the jury in this case existed, was never brought to the consideration of the court, and that it only can be considered as an authority in favor of the power of the court to discharge a jury in case of necessity. Moreover it may be observed, that in Massachusetts the practice continued of keeping a jury after the case had been submitted to them without refreshment, until they had agreed upon the verdict, and that the court considered it wrong to re-

sort to such means to compel a verdict. The same remarks may be made of the case of the *People v. Alcot*,¹ 2 Johns. Cas. in Err. 301. The question was, as to the power of the court to discharge a jury in criminal cases, and Judge Kent, who delivered the opinion of the court, places it upon the ground of necessity, and says, "the moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one; and that it must be a pretty clear case of an abuse of discretion to induce them to say, that the court below ought not to have discharged the jury." This was also a case of misdemeanor, and the court expressly guard against an expression of opinion, as to what would have been their decision upon the facts presented, had the case been capital.

In the case of the *People v. Godwin*, 18 Johns. 188 [9 Am. Dec. 203] the jury was not discharged till within half an hour before the adjournment of the court; and in the opinion of the court delivered by Judge Spencer, he says, that whenever in cases of felony, a jury has deliberated so long upon a prisoner's case, as to preclude all reasonable expectation that they will agree on a verdict, without being compelled to do so from famine and exhaustion, it becomes a case of necessity and they may be discharged. And that in the present case we consider the discharge of the jury a discreet exercise of the powers of that court, either on the ground that the jury had been kept together so long as to preclude all hope of their agreeing, unless compelled by famine or exhaustion, or on the ground, that the powers of the court were to terminate within a few minutes, and that it was morally certain, that the jury would not agree within that period, which produced an absolute necessity for discharging them. This case, then, instead of conflicting with the Pennsylvania decisions, is in our opinion, in full accordance with them. In the case of *The State v. Waterhouse*, Mart. & Y. 278, the supreme court of the state of Tennessee have determined, that in capital cases the courts have a discretionary power to discharge a jury, where they can not agree, but they expressly negatived the idea that it may be exercised without a supervising control, for they say there are cases where a court would act very improperly in discharging a jury, but they do not pretend to specify the cases where it may be done, and where it may not. The case can not then be considered as doing more than deciding that the dis-

1. *People v. Olcott*; 8. C., 1 Am. Dec. 168.

charge of the jury is not *ipso facto*, a discharge of the prisoner, but must depend upon the necessity of so doing, and that if the necessity do not exist, it is an improper exercise of power, and upon a writ of error the prisoner will be discharged. We therefore think, there is no well-adjudicated case conflicting with the decision of the supreme court of Pennsylvania, because in no case referred to was the question, as to what constituted a necessity to discharge, brought to the consideration of the court, and nothing but the question, as to the power so to do, upon a fit case made out.

The reasoning of the case in Pennsylvania, we have said, is to our minds entirely satisfactory. If a moral impossibility for a jury to agree, without being attended with some physical impossibility, constitutes a case of necessity, it is manifest that the decisions of the inferior court can never be reversed. For how can the superior court know whether the jury could have agreed or not, and how long shall the inferior court be compelled to keep the jury together before it shall be warranted in saying that they can not possibly agree? Shall it be an hour, a day, a week, or a month?

Upon the whole, the power of discharging a jury, against the consent of the prisoner, is of such a dangerous character, that we hesitate not in saying that it should not be exercised by the courts, where the jury can not agree on a verdict, unless they be prevented by a physical impossibility from so doing, and that when such impossibility does not exist, the jury should be kept together until such time as the court is about to adjourn, when, of necessity, they must be discharged. This is the situation of the case under consideration. There was no physical impossibility for the jury to agree, and they were discharged at least twenty-four hours before the court adjourned, which was an improper exercise of the power on the part of the court, and the judgment must therefore be reversed and the prisoner discharged.

Judgment reversed.

Cited to the effect that the discharge of the jury impaneled to try a prisoner, without the existence of a cause in law justifying the act, will entitle the prisoner to a discharge: *Ward v. State*, 1 Humph. 259; *State v. Brooks*, 3 Id. 72; *State v. Connor*, 5 Coldw. 313. That a physical impossibility preventing the jury from arriving at a verdict, such as the sickness of one of the jurors, will justify the discharge of the jury: *State v. Curtis*, 5 Humph. 603.

DISCHARGE OF THE JURY IN A CRIMINAL CASE is warranted by the illness of the presiding judge, incapacitating him from attending to the duties of the trial: *Nugent v. State*, 24 Am. Dec. 746 and note; *State v. McKee*, 21 Id. 499.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

TOWN OF HINESBURGH v. SUMNER.

[9 VERMONT, 23.]

PROMISSORY NOTE, THE CONSIDERATION OF WHICH IS COMPOUNDING OF A PENALTY, or the suppressing of a criminal prosecution, is void.

ASSUMPSIT on a promissory note, signed by Sumner as principal and Loveland as security, payable to the town treasurer of Hinesburgh. One of the pleas of the defendants was, that they were induced to give the note to stifle a criminal prosecution. On the trial, they offered to prove that the town had, prior to the giving of the note, commenced two prosecutions against Sumner for retailing liquor without license; that the town grand juror then said to him, that unless he would settle the fines and costs in these two prosecutions, he would have him arrested immediately on other charges; and that Sumner, under fear of being arrested under these charges, executed the note in question. The court, on the objection of the plaintiff, rejected this evidence. The defendant requested the court to charge the jury that the town grand juror had, after the taking of the appeals in the prosecutions above referred to, no authority to settle or stop the prosecutions, they being then beyond his control. The court refused so to charge, and directed a verdict for the plaintiff.

Briggs, for the defendants.

Adams, for the plaintiff.

By Court, **COLLAMER, J.** In assumpsit, it may now be considered as settled, that every defense, except tender, and the

statute of limitations, may be given in evidence under the general issue. If, therefore, the evidence offered by the defendants, constituted or tended to prove any legal defense, it should have been admitted, as the general issue was pleaded. It is true, the testimony did not tend to prove duress, as no unlawful imprisonment was either suffered or threatened. The grand juror was the prosecuting officer for these penalties to final judgment, and he had power to receive the amount of the fine and cost, and discharge the prosecutions, or to enter a *nolle prosequi*. However it may be considered in England, in relation to notes, as commercial paper, we, in this case, and as between the original parties to this note, consider it, under our law, open to all objection in relation to its consideration or inception. The compounding of penalties is an offense at common law, of dangerous tendency, highly derogatory to public example, and prosecutions are no more to be improperly suppressed by public informing officers, than by common informers. And all bonds or notes, into the consideration of which the compounding of a penalty, or the suppression of a prosecution therefor, in any part enters, are void and uncollectible. The officer has a right to receive the amount of the fine and cost, and pay it into the public treasury, and were that all there was of this note, inasmuch as the town treasurer has received it, it might be good and collectible. But it is *contra bonos mores*, and of dangerous tendency, that any prosecuting officer may induce such settlement by using his official influence and power, to threaten with other prosecutions, and to offer to suppress them, in order to procure a settlement of those already commenced and pending. In this case the testimony tended to show, not merely that the two appealed prosecutions were settled, and made up this note, but that two other criminal prosecutions, of what precise character we are not informed, were suppressed as an inducement to the giving of this note.

This is hardly attempted to be justified, even by the plaintiff's counsel, in argument. We think the testimony should have been admitted, and the jury instructed, that, if such proposition was made by the officer, and thereby the defendants were induced to give this note, they should find for the defendants.

Judgment reversed.

PHELPS, J., dissenting.

CONTRACTS WHOSE CONSIDERATION IS AGREEMENT TO COMPOUND OR STIFLE CRIMINAL PROSECUTION.—It is a rule of the common law, firmly established

both in England and in the United States, that an agreement to compound, suppress, or stifle a criminal prosecution for a felony, or for a misdemeanor of a public nature, can not form a valid consideration for a contract, and that every contract based upon such a consideration is absolutely void: 2 Chit. Con. 991; Anson Con. 176; Story Con., sec. 700; 1 Pars. Con. 440; 1 Dan. Neg. Inst., 2d ed. 167, 168; Byles on Bills, 136; *Collins v. Blantern*, 2 Wils. 347; S. C., 1 Smith Lead. Cas. 289; *Edgewcombe v. Rodd*, 5 East, 294; *Clubb v. Hutson*, 18 C. B. (N. S.) 414; *Wallace v. Hardacre*, 1 Camp. 45; *Coppock v. Bower*, 4 Mee. & W. 361; *Ex parte Critchley*, 3 Dow. & L. 527; *Kirwan v. Goodman*, 9 Dow. 330; *Keir v. Leeman*, 9 Q. B. 394; *Williams v. Bayley*, L. R., 1 H. L. 200; *Hinman v. Woodruff*, 11 Vt. 593, citing the principal case; *Smith v. Pinney*, 32 Id. 282; *Cain v. Southern Express Co.*, 57 Tenn. 315; *Ozanne v. Haber*, 30 La. Ann., pt. 2, p. 1384; *Gardner v. Maxey*, 9 B. Mon. 90; *Chandler v. Johnson*, 39 Ga. 85; *Henderson v. Palmer*, 71 Ill. 579; *Murphy v. Bottomer*, 40 Mo. 67; *Cheltenham Fire Brick Co. v. Cook*, 44 Id. 40; *Clark v. Pomeroy*, 12 Allen, 557; *Jones v. Rice*, 18 Pick. 440; S. C., 2 Lead. Crim. Cas. 239; 29 Am. Dec. 612; *Clark v. Ricker*, 14 N. H. 44; *Shaw v. Reed*, 30 Me. 105; *Daimouth v. Bennett*, 15 Barb. 541; *Porter v. Havens*, 37 Id. 343; *Steuben Co. Bank v. Mathewson*, 5 Hill, 249; *Roll v. Raguet*, 7 Ohio, 76; *Corley v. Williams*, 1 Bail. 588. And if any part of the consideration of a contract is the stifling or discontinuance of a criminal prosecution, the whole contract is void: *Wisner v. Bardwell*, 38 Mich. 278; *Kimbrough v. Lane*, 11 Bush, 556; *Gardner v. Maxey*, 9 B. Mon. 90; *Badger v. Williams*, 1 Chip. 137; *Clark v. Ricker*, 14 N. H. 44; *Hinds v. Chamberlin*, 6 Id. 225; *Sumner v. Summers*, 54 Mo. 340; *Bowen v. Buck*, 28 Vt. 308; 2 Chit. on Con. 973. So a court of equity will decree that securities given to prevent a prosecution for a criminal offense shall be delivered up: *Osbaldiston v. Simpson*, 13 Sim. 513.

The reason of the rule stated above is thus presented by Chief Justice Marshall, in *Gardner v. Maxey*, 9 B. Mon. 91: "The commonwealth has a right to rely upon the individual who has received special injury from the commission of a public offense, as the special instrument for its ascertainment and punishment in the due course of law. The particular interest which he may be supposed to feel in bringing the offender to justice, is one of the securities on which the public relies, and has a right to rely, for the enforcement of the laws and its own safety; and an agreement by which this interest is turned against the commonwealth, is in violation of her rights and policy." And Wilmot, L. C. J., in the case of *Collins v. Blantern*, 2 Wils. 349, 350, said: "We are of opinion that the bond (the consideration of which was an agreement not to appear as a witness in a criminal prosecution) is void *ab initio*, by the common law, by the civil law, and all laws whatever. * * * This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice." The authorities are unanimous that any contract which can impede or prevent the due course of public justice is invalid. And so is an agreement to compound even a charge of felony, or of a misdemeanor affecting the public: *Fivaz v. Nicholls*, 2 C. B. 501; *Bigelow v. Woodward*, 15 Gray, 560; *Chandler v. Johnson*, 39 Ga. 85. A review of some of the cases on the subject under discussion will illustrate the application of the rule of the common law which we have enunciated above.

In the late case of *Williams v. Bayley*, L. R., 1 H. L. 200, a son carried to bankers, with whom both he and his father did business, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. The forgeries were discovered, and the son did not deny them. The bankers, without directly threatening a prosecution, insisted upon a settlement, to which the father was to be a party. The latter consented, and, upon his executing an agreement to make an equitable mortgage of his property, the notes were delivered up to him. The vice-chancellor decided that this agreement was void, and ordered it to be delivered up. The house of lords affirmed this decree. Lord Westbury, in delivering his opinion in the house of lords in that case, said: "I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offense would be committed."

In the case of *Coppock v. Bower*, 4 Mee. & W. 361, a petition had been presented to the house of commons against the return of a member, on the ground of bribery. The petitioner afterwards entered into an agreement, in consideration of the payment to him of a sum of money, and upon other terms, to proceed no further with the petition. The court held that this agreement was illegal, and Lord Abinger, C. B., in delivering his opinion said: "Then the next question is, whether this is an unlawful agreement; and I think, that though it may not be so by any statute, yet it is unlawful by the common law. Here was a petition presented on a charge of bribery. Now this is a proceeding instituted not for the benefit of the individuals, but of the public, and the only interest in it which the law recognizes, is that of the public. I agree, that if the person who prefers that petition finds, in the progress of the inquiry, that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investigation. It seems to me as unlawful to do so, as it would be to take money to stop a prosecution for a crime. In either case the prosecutor might say that he is not bound, at his own expense, to continue an inquiry in which the public alone are interested; but such a reason does not amount to an excuse, where he receives money for discontinuing the proceedings." In the case of *Kirwan v. Goodman*, 9 Dow. 330, Mrs. Kirwan, the plaintiff, had employed Goodman, the defendant, as her attorney, and during the course of this employment he had so far misconducted himself, that a rule was granted requiring him to show cause why he should not be struck off the roll of attorneys. While this rule was pending, Goodman induced Mrs. Kirwan not to prosecute it any further, and executed to her a warrant of attorney, by which the payment of a considerable sum of money was secured to her, as the consideration for her agreement not to prosecute. Goodman subsequently applied to the court to set aside this warrant of attorney, on the ground that the consideration on which it was

founded was illegal. The court, upon argument, granted the application. But it seems that to render a promise void on the ground that the consideration thereof was the stifling of a criminal prosecution, it is necessary that the promise should have been made for gain, and not merely from motives of kindness and compassion: *Ward v. Allen*, 2 Metc. (Mass.) 53; *Commonwealth v. Pease*, 16 Mass. 94. And it is no defense to an action on a note, that it was given to suppress a prosecution criminal in form merely, but involving no criminal offense: *Soule v. Bonney*, 37 Me. 128.

PROSECUTIONS FOR BASTARDY MAY BE COMPOUNDED, and a contract, the consideration of which is an agreement to compromise or settle such a prosecution, is legal and valid. Such prosecutions, although criminal in form, are really civil in their character: *Parker v. Way*, 15 N. H. 45; *Holt v. Cooper*, 41 Id. 115; *Robinson v. Crenshaw*, 2 Stew. & P. 276; *Merritt v. Fleming*, 42 Ala. 234; *Holcomb v. Stimpson*, 8 Vt. 141. But see *Smith v. Pinney*, 32 Id. 282, in which it was decided that a note, which was given by the father of a bastard child to the mother, the consideration of which was an agreement on her part, not only to discontinue the civil suit which she had commenced against him, but also to refrain from giving testimony in any further proceedings in reference thereto, that might be instituted against him in any court whatever, was void as founded upon an illegal consideration. In England also, compromises in bastardy cases seem to be permitted: *Goodall v. Lowndes*, 6 Q. B. 464; *Kirk v. Strickwood*, 4 Barn. & Adol. 421. See also *Maurer v. Mitchell*, 9 Watts & S. 69, where it is held, that, since the passage of the act of 1819, authorizing the attorney-general to enter a *nolle prosequi* in prosecutions for bastardy, on agreement between the parties, a compromise between the reputed father and the mother of an illegitimate child, by which it is agreed that the prosecution shall be abandoned, is not founded on an illegal consideration.

COMPROMISES MADE AFTER CONVICTION, especially if made with the knowledge and by the consent of the court, will be sustained as legal: *Beeley v. Wingfield*, 11 East, 46. In that case, a security for the fair expenses of the prosecution was given by the defendant, who stood convicted of a misdemeanor, and the giving of the security was considered by the court in abatement of the period of imprisonment, to which he would otherwise have been sentenced. The consideration was held to be legal and valid. Lord Ellenborough, delivering his opinion in that case, said: "There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. * * * It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offense, in addition to the imprisonment inflicted on him."

WHAT MISDEMEANORS MAY BE COMPROMISED.—It is, as we have seen, well settled that no felony can be compounded; that no prosecution for felony can be impeded or stifled; and that the same is true of all those misdemeanors which affect or concern the public. But the English courts, and to a less extent the courts of this country, seem to recognize the existence of a class of inferior misdemeanors in which the public is regarded as having little or no interest. These misdemeanors are supposed to affect chiefly, if not exclusively, the parties aggrieved thereby, and it is, therefore, held that an agreement between the parties to compromise, compound, or settle them, is not illegal, but may be a valid consideration for a contract: *Druge v. Ibberson*, 2

Esp. 643; *Baker v. Townshend*, 1 Moore, 124; Byles on Bills, 136; 2 Chit. Con. 991; 1 Bish. Crim. L. sec. 711; *Price v. Summers*, 2 South. 578; 1 Story on Con., sec. 700; *Fay v. Oatley*, 6 Wis. 42. It is not easy to determine from the decisions what are the particular misdemeanors which constitute the class that may be lawfully compromised. In England, all simple assaults and batteries seem to be recognized as belonging to that class of misdemeanors: *Keir v. Leeman*, 9 Q. B. 395, *per* Tindal, C. J.; *Bowen v. Buck*, 28 Vt. 313. The authorities in this country on this subject are not so uniform. In *Price v. Summers*, 2 South. 578, it was decided that a bond given to a person injured by an assault and battery, to make satisfaction and to prevent a prosecution, was legal and valid. Southard, J., however, expressed a doubt whether the bond was not void, being given to prevent a criminal prosecution. But in *Corley v. Williams*, 1 Bail. 588, it was decided that a note given to the prosecutor in consideration of his agreement to abandon the prosecution, was void as being founded on an illegal consideration, although the offense charged was only a common assault. And in *Vincent v. Groom*, 1 Yerg. 430, it was decided that a note given for such a consideration was illegal, unless the settlement was made by leave of the court.

Prosecutions for nuisances seem also to be regarded by the English courts as belonging to the class of misdemeanors that may be compounded. The most definite and determinate rule on the subject under consideration, is that given by Chitty: "And the rule on this subject would appear to be, that in all cases of offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit:" 2 Chit. Con. 991. There are cases in the English reports that fully sustain the rule here laid down, but in the recent English case of *Keir v. Leeman*, 9 Q. B. 394, a case frequently referred to with approval in England, the court manifested a disposition to restrict rather than to extend the operation of the rule. Chief Justice Tindal, in that case, said: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offense, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that in all offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further." Redfield, C. J., delivering the opinion of the court in *Bowen v. Buck*, 28 Vt. 313, says that "it is certain that the English statutes and the English practice, allow the party aggrieved far more control and agency in wielding criminal prosecutions for his own private advantage than has ever been allowed here." The same statement would, it is believed, hold true in most, if not in all, of the states. Judge Story says in reference to the subject: "But this exception seems to be doubtful, and at all events only applies to cases where the misdemeanor is purely personal:" 1 Story Con. sec. 700.

GREENO v. MUNSON.

[9 VERMONT, 87.]

ONE WHO GOES INTO POSSESSION UNDER ANOTHER, or acknowledging the title of another, can not be heard to dispute the title of that other, during the continuance of the relation. This principle extends to one who acquires possession under a contract of sale.

PURCHASER WHO GOES INTO POSSESSION UNDER CONTRACT OF SALE can not set up any outstanding title which he may have purchased in, unless he first make a *bona fide* surrender of the possession, and bring his action to try that title.

POSSESSION COMMENCED UNDER CONTRACT OF SALE IS NOT ADVERSE in any sense; nor can the vendee, or any one claiming under him, ever acquire title by the statute of limitations, until he has, *bona fide*, surrendered his possession, or by some unequivocal act repudiated the contract, and this is known to the vendor.

EJECTMENT for fifty-two and a half acres of land off the east end of lot No. 4, in the township of Colchester. It appeared that more than thirty years since, one Boardman held the land in question, under deed, by the name of the Winslow Pitch; that plaintiff's father, Thomas Greeno, went into possession of the same, under a contract of sale of said Boardman's title; that in 1804, Boardman deeded to Thomas Greeno thirty-two acres of said pitch, and in 1811 he deeded the remainder to William Munson, whose title is held by the defendants; that in 1834, Thomas Greeno deeded the thirty-two acres to the plaintiff; that plaintiff and his father have, until very recently, occupied the whole Winslow Pitch, of fifty-four acres; that the defendants then entered into possession of that part deeded to William Munson, and are still claiming to hold it adversely to the plaintiff. The court directed a verdict for the defendants, and the plaintiff excepted.

Maeck and Whittemore, for the plaintiff.

Adams, for the defendants.

By Court, REDFIELD, J. The case finds that Boardman went into possession of the land under deed. This possession would then extend to the whole land. When plaintiff's father went into possession under Boardman, his possession would be that of Boardman, and it would remain the possession of Boardman until Thomas Greeno received his deed of the thirty-two acres, unless he did some act to repudiate his tenancy, and thereby become a trespasser. And after the deed to himself of thirty-two acres, if he continued in possession of the remaining portion

of the pitch, it would be in subordination to the title of Boardman.

The doctrine of the of law tenure, that the tenant can not dispute the title of the landlord, is one too long established, to be now brought in question; and it is one of almost universal application. It has been repeatedly recognized by this court in reported cases: *Tuttle v. Reynolds*, 1 Vt. 80; *Bowker v. Walker*, 1 Id. 19 [18 Am. Dec. 670].

The doctrine of the law, alluded to above, has been, by courts, extended to various other relations of tenure, not coming strictly within the definition of a tenancy. Thus, it has always been held, that the mortgagor shall not be heard to dispute the title of the mortgagee, nor the trustee of the *cestui que trust*, nor, in short, shall any one, who goes into possession of land under another, or acknowledging the title of another, be heard to dispute the title of that other, during the continuance of the relation. The same doctrine has been extended to one, who goes into possession of land, under a contract of sale.

Any one, going into possession of land under the circumstances named, can not set up any outstanding title, which he may have purchased in, but must, first, *bona fide*, surrender the possession, and bring his action to try that title: *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Willison v. Watkins*, 3 Pet. 43. So that as to the twenty-two and a half acres, not included in Boardman's deed to Thomas Greeno, the possession has all along been the possession of Boardman; and when Boardman's title had passed to defendants, they were clearly entitled to hold the land against the plaintiff.

The pretense, on the part of the plaintiff, that he had acquired title to the land, by the statute of limitations, is clearly without foundation. A possession, commenced under a contract of sale, is not an adverse possession, in any sense, nor can the vendee, or any one going in under him, whether knowing the contract of sale or not, ever acquire title, by the statute of limitations, to the land sold, until his possession has been first *bona fide* surrendered, or until he has, by some unequivocal act, repudiated the contract, and this is distinctly known to the vendor.

If, after such determination of the relation, the vendor, *cestui que trust*, mortgagee, or landlord, as the case may be, lies by without asserting any claim of title by ejecting the wrong-doer, his right of entry is barred by the statute of limitations, and the title quieted in the adversary. And, in some cases, it has been held that it makes no difference, whether this disclaimer

of tenure, by the one in possession, is during the existence of the lease, or other contract, or after it has expired. The unexpired term is forfeited, it is said, and the tenant is *quasi* a trespasser, and immediately liable to action of ejectment without notice to quit, and can not protect himself in his possession, in any other way, except by title acquired by the statute of limitations. See cases last cited. There is no evidence in the present case, tending to show any such disclaimer of title.

The judgment of the county court is affirmed.

ADVERSE CLAIM OF TENANT MUST BE MADE KNOWN to the landlord, before the statute will begin to run against him: *North v. Barnum*, 10 Vt. 223, citing the principal case. See, also, *Duke v. Harper*, 27 Am. Dec. 462 and note 466, where other cases on this subject are collected. The principal case is cited in *Teokesbury v. Magraff*, 33 Cal. 244, to the point that a tenant can not set up an outstanding title purchased in by him, until he has first surrendered the possession as tenant.

POSSESSION OF LAND OBTAINED BY BUYING THE CLAIM of a vendee, who is in possession under an executory contract to purchase, is not adverse to the vendor: *Beal v. Brook's Executors*, 23 Am. Dec. 401. See, also, note to *Jackson v. Johnson*, 15 Id. 450, and cases there cited.

SMITH v. BISHOP.

[9 VERMONT, 110.]

MERE IGNORANCE OF HIS CAUSE OF ACTION on the part of a plaintiff does not prevent the operation of the rule that the statute of limitations begins to run from the time when the cause of action accrues.

ACTION IS BARRED IN A CASE WHERE THE CAUSE OF ACTION IS PERFECTED, and the statute of limitations has subsequently run, although the party may have been ignorant of his cause of action, and that ignorance may have resulted from the character of the original fraud in the transaction, or from the manner in which it may have been perpetrated.

ACTION on the case. The plaintiff alleged that the defendant, in 1822, induced him to join with him in the purchase of the exclusive right of making and selling a certain patent improved threshing and winnowing machine; that he represented to the plaintiff that the said right could not be purchased for less than nine hundred dollars, although he well knew, at the time, that it could be obtained for two hundred dollars; that the defendant fraudulently induced the plaintiff to execute and deliver to him his note for four hundred and fifty dollars; that defendant thereupon, in August, 1823, purchased said right, and falsely represented to plaintiff that he had delivered said note to Dennett, from whom the right was purchased; that

plaintiff, in November, 1823, delivered to the defendant boots and shoes to the value of four hundred and fifty dollars, and the defendant then and there fraudulently pretended that the note was then in Dennett's possession, and that when the boots and shoes were delivered to Dennett, he, the defendant, would notify the plaintiff thereof, so that they might be attached at the suit of plaintiff and defendant for the false representations of Dennett relative to the utility of the machine, and the cost of building it. The plaintiff alleged that the defendant had always kept the note in his own possession, fraudulently concealing that fact from him, and that plaintiff did not learn, until 1830, that a nominal price only was paid for the right, and that by reason of the defendant's false and deceitful acts and representations the plaintiff has been defrauded of his boots and shoes. There was also a count in trover for the boots and shoes. Defendant pleaded: 1. The general issue; 2. The statute of limitations. The plaintiff replied, that when the defendant purchased from Dennett, he instructed said Dennett not to tell the plaintiff what he had paid him for the right; that in consequence of the collusive agreement with Dennett, the fraud, deceit, and falsehood of the defendant's representations to the plaintiff were not discovered by him until the spring of 1830, and that this action was commenced within six years from the discovery of the fraud. There was a general demurrer to this replication, and a joinder in demurrer. The county court adjudged the replication insufficient, and the case was brought here on exceptions to this judgment.

Briggs, for the plaintiff.

Maeck, for the defendant.

By Court, PHELPS, J. The question, arising upon the demurrer, involves the sufficiency of the plaintiff's replication; and the case resolves itself into two inquiries, viz., whether a fraudulent concealment of the plaintiff's cause of action will protect him against the operation of the statute of limitations, and if so, whether such a fraud is here alleged as will satisfy the rule.

It is a general rule, that the statute of limitations begins to run from the time when the cause of action accrues, or, in other words, from the time when the plaintiff's right of action is perfected. And it is well settled by numerous precedents, that mere ignorance, on the part of the plaintiff, of his cause of action, creates no exception to the rule. Indeed, if such an

answer could be given to the plea of this statute, it is manifest that no distinction can be made between cases of fraud and cases of any other description. On this point, however, there has never been but one opinion. No case can be found, in which the plaintiff's ignorance of his cause of action has been held, of itself, a sufficient answer to the statute. If, then, there be anything in the answer here set up, it must derive its force from the ingredient of fraud. It is insisted, in general terms, that fraud will take a case out of the statute.

Before the correctness of this doctrine can be tested, it becomes necessary to ascertain with accuracy what is intended by it. The proposition admits of various interpretations, and, with a view to its practical application, may be resolved into several subordinate questions. Is a case, originating in deceit, within the statute at all? If so, is the application of the statute to the case to be qualified so far, as that it will take effect only from the time when the deceit, or its consequences, may be discovered? Is there any distinction, in this respect, between the original deceit, which constitutes the gist of the action, and a subsequent and distinct substantive fraud, having for its purpose the concealment of a cause of action, already perfect? These, and other questions of a similar character, may be put, tending to test both the general accuracy of the doctrine, and its application, if it be in any case sound, to particular cases.

In the view, which we have taken of the subject, we confine ourselves to the question, as it arises in a court of law. The subject presents itself in a very different light, in a court of chancery, exercising its peculiar jurisdiction; for, although that court is, in general, bound by the statute of limitations, yet, in the exercise of its peculiar jurisdiction over frauds, and especially for purposes not cognizable at law, it will relieve from the operation of this statute, as it will against any other undue legal advantage. And I may here add, that the precedents, cited from some of our sister states, lose much of their weight, when it is considered, that, having no chancery court, they have found it necessary to blend some of the distinctive doctrines of chancery with their common law code.

In support of the general doctrine, that fraud will take a case out of the statute, the case of *Bree v. Holbech*¹ is cited. All which can be derived from that case is, that Lord Mansfield was not then prepared, upon the spur of the occasion, to deny the doctrine totally, absolutely, and without qualification. The

1. Doug. 656.

case did not require a decision upon that point, and the doctrine was not recognized. He admits "there may be cases which fraud will take out of the statute;" but the case, instead of sustaining the doctrine as one of universal, or even general application, proves the reverse.

In the state of Massachusetts, it must be admitted, the doctrine contended for by the plaintiff has been adopted. How far the courts of that state, having no court of chancery, were influenced by the consideration already suggested, is not for us to determine. But the doctrine was subsequently examined by the supreme court of New York, and its soundness there distinctly denied. It must be admitted, we think, viewing the doctrine with reference to proceedings at law, that the weight of authority is most decidedly against it; especially if we consider its adoption in some states as a substitute for a distinct chancery jurisdiction.

In principle, we think it can not be sustained, as a general rule of law, in the broad terms made use of; but if it be applicable to any case, it must be to one of peculiar character, and under circumstances deserving of special consideration. It will not do to say that, whenever the cause of action originates in fraud, the statute of limitations does not apply. Such a decision would repeal the statute. The case is, in terms, embraced in the statute, and by the express provision of the law, the statute begins to run from the time when the cause of action accrues. Whether the operation of the statute would be more equitable if a different criterion were adopted, is a question for legislative consideration. We can neither repeal nor alter the statute; we can, therefore, neither exempt the case from the operation of the statute, nor control that operation by suspending it till full knowledge is obtained by the party of the character and consequences of the injury. Whether the ignorance of the party is fortuitous merely, or results from the character of the fraud, or the manner in which it is perpetrated, we consider immaterial. We are of opinion, that where the cause of action is perfected, and the statute of limitations has subsequently run, the action is barred, although the party may have been ignorant of his cause of action, and that ignorance may have resulted from the character of the original fraud, or the manner in which it may have been perpetrated.

We are, by no means, sure that this is not the most equitable doctrine. The statute of limitations, as applicable to a case like this, is emphatically a regulation of policy. Its object is to put a perpetual seal upon stale controversies, and prohibit

their agitation, at a period when the usual means of eliciting truth are not at hand, but are removed forever—when right can not be ascertained, and justice must be administered at random. If we make the protection of the statute to depend upon the plaintiff's knowledge of his injury, we require the defendant to perpetuate the evidence of that knowledge, during all time; and we expose him, when this and other evidence, necessary for his defense, shall have passed from him to fresh litigation, with no other guide to a correct adjudication, than the shreds of evidence, which accident, or a more subtle and sagacious adversary, may have preserved. If we could engraft such a provision upon the statute, we should destroy its practical utility and defeat its great purpose.

Another and a more difficult question may arise. Whether, the cause of action being perfected, a subsequent, distinct, and substantive fraud, having for its object to deceive the party in relation to his rights, would take the case out of the statute, is a question which we do not deem it necessary to decide. Such a case might arise, where the action is founded on a contract. In such a case, whether the remedy on the contract would be barred, although the statute may have run, in consequence of a fraudulent concealment, would admit, perhaps, of different consideration. We do not consider this case as of that description. Nothing is set forth in this replication, except what constitutes a part of the original deceit. This being the case, the subject falls within the rule already laid down. Nor do we think that the matter, set forth in the replication, amounts to such a fraudulent concealment, as would affect the case, under any rule.

In the first place, a mere request of secrecy to a third person, sustaining to the transaction the mere relation of a witness, has never, as we believe, been regarded as an actionable fraud. Nor can we so regard it here, inasmuch as no application appears to have been made to the witness, to disclose the facts of the transaction, nor does any misrepresentation appear to have been made to the party in relation to them. In the second place, if we consider the representation, as to the cost of the contemplated purchase, as the gist of the action, the actual price paid is not important. The question is, whether the defendant's representations were *bona fide*, or otherwise? and the mere fact, that he gave a less price than was expected, does not constitute a fraud.

In short, it does not appear that there was any fraudulent

concealment of the facts, known to the witness, nor, if there had been, does it appear that those facts were material to the action. Admitting that a fraudulent concealment would have the effect contended for by the plaintiff, still, that concealment must be of facts essential to the action.

Upon the whole, we see nothing in the case to take it out of the statute of limitations; and the judgment of the county court must be affirmed.

Cited and approved in *Campbell v. Vining*, 23 Ill. 530; also, cited in *Andrews v. Dole*, 11 Bank. Reg. 361, to the point that the statute of limitations begins to run from the time of the first accrual of the cause of action, even when the defendant has fraudulently concealed it from the plaintiff.

RUNNING OF STATUTE IN CASES OF FRAUDULENT CONCEALMENT of cause of action: See note to *Reeves v. Dougherty*, 27 Am. Dec. 503, where other cases in this series on this subject are collected.

ANDERSON v. DAVIS.

[9 VERMONT, 136.]

PROMISE TO PAY THE DEBT OF ANOTHER, if the original debtor still remains liable, is collateral, and within the statute of frauds; but if the original debtor is discharged, the promise to pay is an independent contract, and need not be proved to be in writing.

ORIGINAL DEBTOR IS NOT A COMPETENT WITNESS FOR THE PLAINTIFF to prove that the promise to pay was an independent contract, and not collateral.

ACTION on book. After judgment to account, the county court referred the cause to an auditor, from whose report it appeared: That the defendant contracted with one Lamb to erect a building; that Lamb afterwards, and without notice to the defendant, engaged the plaintiff as a partner; after working on the building for a time Lamb was taken sick and the work ceased; the defendant then agreed to pay plaintiff for the work he had done, and for the work he should do in the future; the account includes both. Before the auditor the plaintiff introduced Lamb as a witness to prove the defendant's undertaking. The defendant objected, but the auditor admitted the testimony. The county court accepted the auditor's report, and rendered judgment for the plaintiff for the whole account. Defendant excepted and appealed.

Smalley and Adams, for the plaintiff.

By Court, COLLAMER, J. The first question arising on this report, is this: can an action be supported by the plaintiff for

his labor, done before the defendant's promise, except by proving that promise in writing, and by an action of special assumpsit thereon? In the case of *Harrington v. Rich*, 6 Vt. 666, the judge, in delivering the opinion, remarks, that it has not been settled under our statute, as it has in England, that, if in taking the new promise the original debt becomes discharged, the promise is not within the statute of frauds. That is now the question. There was no original privity between these parties. The defendant employed Lamb, and Lamb employed the plaintiff. To Lamb alone could the plaintiff look for his labor, up to the time of the defendant's promise to the plaintiff. There is no pretense that the promise was in writing, and, if it is within the statute of frauds, the plaintiff can not recover. If the defendant became holden to the plaintiff for this claim against Lamb, as collateral to Lamb, and the claim still remained against Lamb, it was within the statute. But if the defendant was to assume the debt, and he, alone, to be holden, and Lamb to be discharged, then the contract was not collateral, but independent, and not within the statute, and required no note in writing nor special action therefor. This is fully settled in England: *Goodman et al. v. Chase*, 1 Barn. & Ald. 297; and in the state of New York (Kent, C. J., in *Leonard v. Vredenburg*, 8 Johns. 29) [5 Am. Dec. 317], upon statutes, of which ours is a transcript, and no reason is seen why ours should not receive the same construction. The report is not so clear on the point, whether Lamb was to be further holden, as could be desired; but assuming that the contract was, that the plaintiff was to have no further claim on Lamb, and that this was what constituted the consideration for the defendant's promise, together with the plaintiff's continuing his work, this brings us to another point in the case.

On the trial, the plaintiff proved his case, in whole or in part, including this contract between the parties, by the testimony of this same Lamb, though objected to by the defendant. It has already been shown, that the plaintiff, in proving his case, must show, in effect, that the defendant assumed this claim against Lamb, on whom the plaintiff was to have no further claim. This would entirely release Lamb, as he would thereby be clear from the plaintiff. Lamb had no claim on the defendant, as he never completed the building, and the defendant, even if he paid the plaintiff, would have no claim on Lamb, as the latter never requested such payment. This was a result, which Lamb was directly interested to produce, and

which a recovery by the plaintiff would produce. Lamb was, therefore, not a competent witness for the plaintiff.

Judgment reversed.

Report recommitted.

PROMISE TO PAY DEBT OF ANOTHER, when not within statute of frauds: See *Cooper v. Chambers*, 25 Am. Dec. 710, note 711; *Rogers v. Collier*, 23 Id. 153, note 155, where other cases on this subject are collected. If the primary debtor is released, and the secondary liability is the sole debt, the case does not come within the statute of frauds: *Watson v. Jacobs*, 29 Vt. 171, citing the principal case. The principal case is also cited in *Cross v. Richardson*, 30 Id. 649, to the point that a consideration, to be sufficient to satisfy the statute of frauds, must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee, entirely independent of the original debt; and in *Fullam v. Adams*, 37 Id. 400; in *Cole v. Shurtleff*, 41 Id. 315; in *Bunford v. Purcell*, 4 G. Greene, 489; and in *Sternburg v. Callanan*, 14 Iowa, 259, to the point that an engagement to be accountable for the debt of another must be in writing.

SMITH v. BENSON.

[9 VERMONT, 138.]

ONE TENANT IN COMMON CAN NOT CONVEY A PORTION OF HIS INTEREST in the common estate by metes and bounds; the conveyance in such case should be of an aliquot portion of the tenant's entire interest.

LEVY OF EXECUTION ON PART OF INTEREST OF ONE TENANT IN COMMON, made upon such tenant's entire interest in a portion of the estate, described by metes and bounds, is void.

DAMAGES IN EJECTMENT CAN NOT BE RECOVERED unless there is a recovery of the land.

EJECTMENT for lands in Highgate. Plaintiff derived title by virtue of the levy of an execution, against Abijah Benson, on his interest in the land in controversy, as tenant in common with the defendant. It was admitted that said Abijah and the defendant were tenants in common of a tract of land of which this now in dispute was a part, and that it was set off by plaintiff on his execution, and described by metes and bounds. It was also admitted that the defendant had always refused to recognize the plaintiff as tenant in common of any part of the land. The county court held the levy void.

Smith, Aldis, and Stevens, for the plaintiff.

Brown, for the defendant.

By Court, REDFIELD, J. This question has never been directly before this court for adjudication till now. In the case of

Galusha v. Sinclear, 3 Vt. 394, an opinion is expressed, *arguendo*, that such a levy as the present would not be valid. This opinion of the late chief justice has, to a considerable extent, gained the confidence of the profession, as being founded in sound reason.

When the levy of an execution or deed of conveyance is extended over the entire interest of the tenant, no question ever arises. Most of the conveyances by tenants in common, found in the books, are of this character. I find no authority at common law for a conveyance by one tenant in common of a portion of his interest in the common estate, by metes and bounds. The intimations referred to by Jackson, J., in his opinion in the case of *Bartlet v. Harlow*, 12 Mass. 348 [7 Am. Dec. 76], as found in Coke and Coke Littleton, and Viner's Abridgment, are wholly unsatisfactory. If any such mode of conveyance was ever attempted at common law, no case has come up for judgment involving that question. It is laid down by all the early writers upon this subject, that one tenant in common or joint tenant can do no act prejudicial to the common estate. Hence, it has been inferred, he could not convey a portion by metes and bounds. And in Massachusetts and Connecticut the doctrine is well settled, that such conveyance is void: *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22]; *Mitchel v. Johnson*,¹ 4 Conn. 495; *Griswold v. Johnson*, 1 Id. 363.² In both those states, too, a levy of execution, in the same manner, is held void: *Starr v. Leavitt*, 2 Id. 243 [7 Am. Dec. 268]; and *Hinman v. Leavenworth*, Id. and note; and *Bartlet v. Harlow*, *ubi sup.* We are inclined to adopt the doctrine of these cases.

We know that the argument *ab inconvenienti* is one not very difficult to be had, in a science composed of difficulties and doubts, and, therefore, not an argument of much weight in most cases. But in the present instance, it does seem not a little perplexing to resist its force. If one tenant in common is to be permitted to convey his portion of the estate, by separate parcels, to more than one, he may to any number. And if these conveyances are valid, the co-tenant is bound to make partition with each of these separate grantees, and an estate, which originally was valuable, with the right to compel partition with one only, becomes wholly worthless, from the obligation to submit to perpetual subdivision.

Before the statutes of Henry VIII. and William III., tenants could not be compelled to make partition of their lands. The

1. *Mitchell v. Haven*; S. C., 10 Am. Dec. 169.

2. *Griswold v. Johnson*, 5 Conn. 302.

mode of conveyance, then, while the estate must still be held in common, unless all the proprietors consented to partition, was not very important. But after the compulsory partition, provided by these statutes, which exists with us also, it became almost indispensable to the rights of co-tenants, that they should not be compelled to submit to repeated subdivisions of the entire estate. Under this process, the separate parcels might not be adjoining each other, and thus be rendered more, or less useless, under different circumstances. It is not necessary to state extreme cases. Almost no case can be supposed, that will not expose the co-tenant to injustice, which will be prevented by requiring the conveyance to be of an aliquot portion of the entire interest. The arguments, which have been named, apply with still greater force to the case of a levy of execution. This is a conveyance by operation of law, and should not be allowed, except where the estate might be so conveyed by the debtor. It is a conveyance *in invitum*, and it will, therefore, be still more unreasonable to subject the co-tenant to the caprices of fifty creditors, than of his co-tenant, whom he may be said, in some sense, to have selected. If this mode of conveyance is allowed, it will put it in the power, not only of the tenant, but of his creditors, very materially to control the partition, not in accordance with the statute, but their own whims.

It may be true, that this levy will operate as an estoppel against the debtor, Abijah Benson, and, had partition been made, it might enable the plaintiff to hold so much of the land as fell to the share of the debtor. But that case is not now before us. The claim to recover rents and profits, in this action, even although the court should not consider the levy valid, is ill-founded. In the action of trespass and ejectment, as our action of ejectment is sometimes denominated, mesne profits are recovered only in those cases, when at common law the action of trespass for mesne profits would lie, *i. e.*, when there had been a recovery in ejectment. The recovery of damages, in this action, is but an incident of the recovery of the land. If the plaintiff fails to recover the principal, he must of course fail to recover the incidents.

As we consider the levy insufficient to convey the land, the judgment of the court below is affirmed.

CONVEYANCE BY METES AND BOUNDS by one of several co-tenants: See Freeman on Co-tenancy and Partition, secs. 199-288; *Jewett's Lessee v. Stockson*, 24 Am. Dec. 534, note 597. The principal case is cited in *Swift v. Dean*,

11 Vt. 325, to the point that a levy of execution upon the equity of redemption in mortgaged premises belonging to co-tenants, if upon less than the whole, must be upon an aliquot proportion of the whole, and not upon a part described by metes and bounds.

The principal case is also cited in *Campau v. Godfrey*, 18 Mich. 37, to the point that a sale on execution stands on the same ground as a deed from the defendant in execution; and in *Campau v. Campau*, 19 Id. 127, to the point that deeds, although not binding upon the defendants, co-tenants, were binding as between themselves. Criticised in *Stark v. Barrett*, 15 Cal. 370.

STEVENS v. HEAD.

[9 VERMONT, 174.]

ASSIGNMENT OF PARTICULAR INTEREST IN A PATENT RIGHT, or a conveyance of a right to use an invention in a limited territory, is not required to be recorded in the patent office.

VENDEE OF RIGHT TO USE A PATENTED INVENTION, who has not been disturbed in the exercise of such right, must show that the vendor had no right to convey, if he seeks to recover against him on the ground that there was no right conveyed.

PAYMENTS VOLUNTARILY MADE WITH FULL KNOWLEDGE, or means of knowledge, of all the facts in relation to the transaction, can not be recovered back.

ASSUMPSIT. The deposition of the superintendent of the patent office, to which reference is made in the opinion, was offered by the plaintiff to show that no assignment of the whole or any part of the latter's patent from the patentee to the defendant, had ever been recorded in the patent office. The county court nonsuited the plaintiff, with leave to move this court to set aside the nonsuit. The other facts appear from the opinion.

Harmon, for the plaintiff.

Warner and Briggs, for the defendant.

By Court, WILLIAMS, C. J. This action was brought to recover certain sums of money paid, and for the value of goods delivered, by the plaintiff to defendant, in payment of notes, which were executed by the plaintiff, and by the plaintiff and his surety to Strong & Head. The suit was originally commenced against Strong & Head. The notes, it appears, were executed on the purchase by the plaintiff from Strong & Head, of the right of making, constructing, using, and vending to others to be used, an improved cider-mill, in different parts of the state of Vermont, for which a patent had been obtained, by one Wicks. The plaintiff claims that no consideration passed for the notes, that the money and goods paid thereon were paid

without consideration, and that, therefore, he is entitled to recover back the same in this form of action. It is to be observed that no fraud or deceit is imputed to the defendant, nor has anything transpired, since the execution of the notes, to impair the right, whatever it was, which was conveyed to the plaintiff.

Some questions have been made to the court, which it may be well to notice, although the decision of them may not be necessary to determine the case before us. The plaintiff has contended, that the defendant had no right to make the conveyance, which was the consideration of the notes, as he had not procured his assignment from Wicks to be recorded; or, at least, that it was incumbent on him to show his right, after the deposition of the superintendent of the patent office had been read. Our opinion is against the plaintiff on both of these positions. We think that an assignment of a particular interest in a patent right, or a conveyance of a right to use an invention, in a limited territory, is not required to be recorded in the patent office, by the laws of the United States. And as the plaintiff has not been disturbed in the exercise of the right, as conveyed, if it was essential to his right of recovery to prove that Wicks, or his assignees, had never conveyed to the defendant, or authorized him to make such conveyance as he did, the burden of proof was on him; as it was equally convenient for him to make such proof, as for the plaintiff to prove the affirmative. It also may be worthy of consideration, whether the plaintiff has not misconceived the action, if the word "grant" in the indenture implies a covenant of title, as he contends.

In the case before us it appears, that notes were given by the plaintiff for the purchase; that these notes were afterwards paid. If the patent was void for any of the reasons, which have been urged, either party had equal means of ascertaining it; and no misrepresentation was used by the defendant, nor any concealment of any material fact within his knowledge. The payment, therefore, by the defendant, was purely voluntary, with a full knowledge, or means of knowledge, of all the facts in relation to the transaction; and to permit a recovery, under these circumstances, would contravene a plain and acknowledged principle of law: *Brown v. McKinally*, 1 Esp. 279; *Marrriot v. Hampton*, 2 Id. 346.¹

There is manifestly a wide difference between permitting the maker of a note, given for a patent, void on its face, to avail himself of the want of consideration, as a defense (and such

1. 2 Esp. 546.

was the case from 13 Wend.), or allowing him, after he has paid such a note, to recover back the sum paid. Of the case of *Corbin v. Kendrick*, 4 T. R. 481,¹ which is relied on to show that the payment was not voluntary, it is only necessary to remark that the question, whether the payment was voluntary, does not appear to have been raised, and moreover, the law upon the subject of voluntary payment, probably, was not fully settled at that time; the only point made in the court of king's bench, was a question of evidence in relation to the admissibility of an attorney to testify to communications from his client. Starkie, in his treatise on evidence, vol. 2, p. 118, treats it as a case where money has been paid on compromise of an action, the compromise having failed and another action brought. The case itself can not be considered as an authority for the ground taken by the plaintiff in this action. We do not discover any error in the views taken by the county court. The plaintiff, therefore, takes nothing by his motion.

VOLUNTARY PAYMENTS CAN NOT BE RECOVERED BACK: See note to *Feemster v. Markham*, 19 Am. Dec. 135.

RIX v. ADAMS AND THROOP.

[9 VERMONT, 233.]

CONSIDERATION, PROMISE OF INDEMNITY, WHEN VOID FOR WANT OF.—

Where one for whom another is surety procures a third person to sign a promise of indemnity to such surety, and there is no new consideration for such promise, and it is not made in pursuance of any contract entered into at the time of the original contract, the promise to indemnify is void for want of consideration.

PROMISE TO REMAIN SURETY FOR ANOTHER FOR INDEFINITE TIME is not sufficient consideration for a promise to indemnify such surety.

DEMURDER. The county court sustained the demurrer to the first count of the plaintiff's declaration, of which the following is the substance: In March, 1832, the plaintiff became surety to Adams in a promissory note to Downer, payable on the tenth of July following; which note was given solely for the debt of Adams, and the plaintiff had no interest in it, except as becoming surety for Adams. In 1834, the note not being yet paid, the plaintiff, fearing that Adams was becoming less responsible, became unwilling to remain surety, without some better security to himself. This fact became known to Adams, who then procured Throop to sign with him a promise to save the plaintiff

1. *Cobden v. Kendrick*, 4 T. R. 482.

harmless from all cost and damages which might accrue to him in consequence of his having signed said note to Downer. The defendants failed to keep this promise, and the plaintiff was obliged to pay the note.

Huchinson, for the plaintiff.

Marsh and Converse, for the defendants.

By Court, REDFIELD, J. If the contract, alleged in the declaration, is founded upon any consideration, it must be the original undertaking of Adams, as principal, in the debt to Downer, or the "keeping plaintiff easy," in his relation of surety to Downer. The latter consideration is one, in its terms, of rather novel impression; but in fact, it is synonymous with forbearance. The contract, then, is substantially that of defendants, jointly guaranteeing plaintiff's immunity on his liability to Downer. There is no pretense of any consideration moving between Throop and Rix. Throop is the surety of Adams in the last contract. And the consideration between the principal debtor and the creditor is that, which makes the obligation of the surety, in any case, binding.

But what is the consideration of this new contract, as between Adams and Rix? Rix had, long before this, assumed the obligation of surety, and without any expectation of this, or any other special indemnity. Had the contract been made in pursuance of a contract entered into at the time of plaintiff's becoming surety for Adams to Downer, it would be considered a part of that contract, and upon sufficient consideration: *Knapp v. Parker*, 6 Vt. 642. But that is not this case. There was nothing, then, in Adams' original contract with plaintiff, which looked towards the present contract, or will support it. This does not seem to be relied upon by the plaintiff. His declaration is not formed with reference to any such consideration.

In relation to the consideration of forbearance, we can well suppose a case, where the consideration is sufficient to support a new and independent contract of indemnity, of the character now contended for. If there had been an undertaking, on the part of Downer, upon sufficient consideration, to wait a definite time on the original debt, and the plaintiff had promised to stand surety, during that term, and this contract, now in suit, had been made to induce the forbearance, the defendants would no doubt be liable upon their contract. But such is not the contract alleged. The undertaking of Adams, so far as his previous obligation is concerned, is like one guaranteeing the payment of his own debt

and is never the foundation of a new promise, unless the original liability is merged and lost in the new contract. If it is pretended Adams assumed a new and different liability from that which before existed, then it was a mere naked promise, founded upon no sufficient consideration. It was, in either case, founded upon a past and executed consideration, and, as such, void. It is very similar to the case of *Harding v. Craigie*, 8 Vt. 501. Plaintiff had not become Adams' surety at Throop's request, or for his benefit. There is no benefit accruing to defendant for this new promise, and no injury to plaintiff. He did not undertake to stand surety for Adams, for any definite time, and a promise to remain surety an indefinite time, to be determined at his own option, was as no promise, for he was already surety on those identical terms. The contract being in writing does not vary the case. It obviates the statute of frauds, but will not dispense with the necessity of a sufficient consideration. The undertaking "of one man for the debt, default, and miscarriage of another," must not only be in writing, but upon some sufficient consideration. The declaration is insufficient, and the judgment below must be affirmed.

CONSIDERATION FOR A PROMISE, SUFFICIENCY OF: See note to *Hind v. Holdship*, 26 Am. Dec. 108, and the cases there cited.

PROMISE TO FORBEAR IN GENERAL, without adding any particular time, is to be understood a total forbearance: *Clark v. Russel*, 27 Am. Dec. 348.

HOLMES v. BURTON.

[9 VERMONT, 252.]

NOTE GIVEN BY ONE PARTNER IN HIS INDIVIDUAL NAME can not be enforced against the partnership, though made in consideration of property of which the firm had the benefit.

ASSUMPSIT, against the defendants, as partners of one Levi Blood. The first count was upon a note signed by Blood, "for the interest, profit, and benefit of the said firm of Levi Blood & Co." The second and third counts were for a horse sold by the plaintiff to the defendants. Plea, *non assumpsit*. The court rendered judgment for the plaintiff, and the defendants excepted. The other facts appear from the opinion.

Tracy, for the defendants.

Cobb and Peck, for the plaintiff.

By Court, PHELPS, J. We are of opinion that the plaintiff can not recover upon either count in his declaration. Not upon the first count, for the note is, on the face of it, the individual note of Blood, and not of the partners. Here is an open, notorious partnership, and the paper does not profess to bind them. Had the defendants been dormant partners, the case would have been different. The signature might then be understood to be that of the firm, and with proper averments and proof, the plaintiff might recover against them. But here there is a partnership open and notorious, and, upon the face of the note, the presumption is, that the plaintiff relied upon the responsibility of Blood alone. Under the second count, the question is, whether the plaintiff can resort to the consideration of the note, and recover as for goods sold.

The first difficulty in this course is, that the note itself is evidence that the horse was not sold to the firm, nor upon their credit. It has been held, that if money be advanced to a firm, upon the individual security of one partner, the firm are not liable. This rule holds, where the partnership is public, although it may not apply to the case of a dormant partnership. It goes upon the ground that the creditor elects to take the individual security. Secondly. This not being the case of a dormant partnership, the plaintiff can not recover upon his general count, unless he is at liberty to repudiate the note, and can also recover upon the sale, as if no note had been given. He can not repudiate the note, because there was no fraud nor concealment; and further, it is not a case where the presumption would arise, that the purchase was made in behalf of the partnership. The purchase of horses is not within the legal scope of the partnership, and one partner has no authority to bind the other in this way. It is said, it is customary for mercantile firms in the county to deal in horses. This will not vary the case. If a particular firm have dealt in this way, it will afford evidence, in such case, of an authority in one partner to bind the other. But although the practice is common, it does not follow that it is a legal consequence of the connection. Here, then, is a case, where a contract is made, not within the scope of the partnership, and where the partner has not pledged the credit of the partnership, but his own. He had neither authority to bind his fellows, nor did he attempt to do so. How, then, can the plaintiff recover?

The cases cited by the plaintiff are cases where the purchase was within the scope and for the benefit of the partnership. It

is said, also, that the defendants may be considered, *quoad* this purchase, as dormant partners. Such a precedent would be dangerous in the extreme. It would obliterate the distinction between partnership debts and the individual debts of the partner, and it would be at variance with the settled law on the subject. The defendants may, indeed, have had the ultimate proceeds of the transaction. But this is not enough. Property may go to the ultimate benefit of a firm, and still the partners may not be liable. If there be any case in which one partner can purchase property or loan money, to be put into a partnership, on his own account, the argument fails. But there is no satisfactory evidence that the defendants had the benefit of this purchase. The money, for which the horse was sold, went into the concern, but upon what conditions does not appear. For aught we know, Blood credited himself with the money.

As to the supposed adoption of the proceeding by the defendants, it is sufficient to say, that it does not appear that they ever adopted it, or recognized the debt as their own. The entering it as a debt of the concern, was the act of Blood, and it does not appear that the defendants then knew how the note was signed. They could not be bound by any adoption of the act, unless with full knowledge of all the circumstances.

Judgment reversed and cause remanded.

NOTE OF ONE MEMBER OF A PARTNERSHIP: See *Manufacturers' Bank v. Winship*, 16 Am. Dec. 369, note 372; *Arnold v. Camp*, 7 Id. 322, note 330; *Pateshall v. Apthorp*, 1 Id. 3, note 4.

BAXTER v. WILLEY.

[9 VERMONT, 276.]

LEX LOCI CONTRACTUS DETERMINES THE NATURE AND CONSTRUCTION of a contract, unless such contract is made with a view to performance in another place.

TITLE TO LAND IS DETERMINED BY THE LAW OF THE PLACE WHERE IT IS SITUATED.

EQUITY OF REDEMPTION CAN NOT BE FORECLOSED by any form of words used in an instrument, when the real intention of the parties was to secure the payment of a debt, and not to extinguish it.

ABSOLUTE CONVEYANCE OF LAND IN PAYMENT OF OVERDUE NOTES which are not delivered up to the grantor, would probably be treated as a mortgage, if the land were situated in this state, but otherwise when it is situated in Canada, where such a transaction would be treated as an absolute conveyance in payment of the debt, as it would be here also, had the notes been surrendered.

ASSUMPSIT, on a promissory note, submitted to the county court on a case stated. The note sued on was one of three notes in payment of which the defendant deeded to the plaintiff a piece of land in Lower Canada, in which country both of the parties were at the time. Defendant did not take up the notes. Plaintiff then gave to defendant a writing signed by him, stating that defendant had deeded to him a piece of land in payment of the three notes above mentioned. The writing also stated that plaintiff agreed, if defendant would pay him the amount due on said notes at the end of two years, to redeed the land to the defendant. This writing was sold to one Berry, who sold it to a third party, but it has since been lost. It was agreed that, if the court should, on the statement of facts, be of opinion that the transaction was a mortgage, judgment should be rendered for the plaintiff on the note; but if otherwise, judgment should be entered for the defendant. The court gave judgment for the defendant, and the plaintiff excepted to the decision.

Farr and Upham, for the plaintiff.

Underwood, for the defendant.

By Court, REDFIELD, J. The contract here sued was made within the province of Lower Canada, and was there to have been performed. No principle is better established, perhaps, than that the nature, construction, validity, performance, release, and discharge of a contract are to be determined by the *lex loci contractus*, unless the contract is made with reference to performance in another place, in which case those incidents will be subject to the law of the place of performance.

The provinces of Canada, it is well known, although dependencies of the British crown, are not governed by British laws, so far as civil proceedings are concerned. It was one of the conditions of the surrender of those provinces by the French, that they should be permitted to enjoy, in perpetuity, French law, unless repealed or modified by their own legislature. This has not been done, except to a very limited extent. The French civil law, as it existed at the time of the cession, still obtains there, in all its original rigor and rudeness, and with all its inequalities and imperfections. It is the *coutume de Paris*, without any of the qualifications, and manifest meliorations and improvements of the code Napoleon. It is, in short, the civil law of Rome, substantially as found in the Pandects. They have no courts of chancery, and their courts of law exercise equity powers only to a very limited extent, and

this chiefly in cases where such powers have been conferred by express statutes. These statutes are almost all limited to some short term of years, and, in the present perilous times, the chance of their being renewed is not a little precarious. Hence, this case must be here decided, so as to make the parties safe. And this safety must of necessity be in some degree measured by the laws, and the constitution and manner of proceeding in the courts of Canada. For the land being there situated, the *lex rei sitæ* must determine the title to it. The contract, in terms, is an absolute conveyance of the land to the plaintiff, "in payment" of this note, with the right of defendant to repurchase, upon payment of the amount of the price agreed, and the interest. This note, with others, was due plaintiff from defendant, some time previous to the conveyance of the land, and was not surrendered by plaintiff, but retained. This, with other circumstances, might enable a court of equity to treat the transaction as substantially a mortgage, and allow the defendant an equity of redemption. And if so, the plaintiff would be entitled to sue upon his notes. If the land were situated here, we should probably be inclined so to treat the case.

For if the real object and intention of the parties was to secure the payment of the debt, and not to extinguish it, no form of words will enable them, upon the happening of any subsequent event, or any default on the part of the debtor, to foreclose his equity of redemption, but with us, any such contract is absolutely void. This is, indeed, a principle of chancery jurisdiction, and not of courts of law, as such: *Hughes v. Edwards*, 9 Wheat. 489; *Henry v. Davis*, 7 Johns. Ch. 40. It is well settled that a court of equity will treat every contract for the security of a debt, by conveyance of real estate, although not evidenced by any written defeasance, but resting wholly in parol, as a mortgage: *Campbell v. Worthington*, 6 Vt. 448. But, at law, such conveyance vests the absolute title in the grantee, unless the defeasance is under seal: *Kelleran v. Brown*, 4 Mass. 443. And if, on a sale of land, there be a *bona fide* condition of repurchase or avoidance of the sale, it is valid, but if the debt be not extinguished in the present tense, it will be treated in equity as a mortgage: *Id.*; *Conway's Ex'rs et al. v. Alexander*, 7 Cranch, 218.

If the land in question, in the present case, were within our own jurisdiction, so that the defendant's equity of redemption could be secured to him, by our sustaining this suit, we should, doubtless, be inclined to do so. But it must, *ex necessitate*, per-

tain to every jurisdiction, to determine exclusively, all questions pertaining to the title of real estate, and unless we could feel sure that the courts in Canada will permit the defendant to hold an equity of redemption in the land conveyed to plaintiff, it would be unjust, in the last degree, to permit the plaintiff here to take judgment, which might result in compelling the defendant to pay the price of the land, without the possibility of ever reclaiming the same. We have no doubt that, in Canada, this would be treated as an absolute conveyance in payment of the debt, and that defendant had, at most, a right of repurchase, which was lost by lapse of time. And had the transaction occurred here and the notes not been retained by plaintiff, we should so view it.

The judgment of the county court is, therefore, affirmed.

DEED ABSOLUTE IN FORM, WHEN TREATED AS A MORTGAGE: See *Bennock v. Whipple*, 28 Am. Dec. 186, note 188; *Colwell v. Woods*, 27 Id. 345, note 348; *Gillis v. Martin*, 25 Id. 729, note 735; *Bennet v. Holt*, 24 Id. 455, note 458; *Harbison v. Lemon*, 23 Id. 376; *Edrington v. Harper*, 20 Id. 145; *Poindexter v. McCannon*, 18 Id. 591; *Chase's case*, 17 Id. 277 and note 300, where the subject is fully discussed; also, *Wright v. Bates*, 13 Vt. 348, citing the principal case.

LEX LOCI CONTRACTUS GOVERNS the rights and liabilities of the parties to a contract: See *King v. Harman's Heirs*, 26 Am. Dec. 485 and note 491, where the cases on this subject are collected.

STATE TREASURER v. CROSS.

[9 VERMONT, 289.]

CONTRACT BY WHICH SUBSCRIBERS PROMISE TO PAY TO THE STATE TREASURER the sums set opposite their names, toward building a state-house, is not void for want of consideration, nor can objection be made thereto on the ground of public policy or propriety.

SUIT ON SUCH CONTRACT MAY BE BROUGHT either in the name of the people of the state or in the name of the state treasurer.

IT IS NO DEFENSE TO SUCH ACTION that the sum subscribed exceeded the amount to be raised; but in that case the subscriptions of all should abate *pro rata*.

ASSUMPSIT upon a subscription paper, for the purpose of building a new state-house in Montpelier. Plea, the general issue. The plaintiff introduced testimony to show that in 1831 the legislature appointed a committee to receive proposals for building a new state-house; that defendants signed a subscription paper in which one thousand dollars is set opposite their names; that they have jointly paid four hundred and ninety dollars; that the legislature, in 1832, passed an act authorizing the building

of a new state-house at Montpelier, provided the inhabitants or any individuals should give security to the treasurer to pay into the treasury of the state the sum of fifteen thousand dollars; that a committee of signers to said subscription gave security to pay the sum required by the statute, and the state had erected a durable state-house, at an expense of about one hundred thousand dollars. The defendants introduced evidence to show that the said committee of subscribers had paid into the treasury the full sum of fifteen thousand dollars, and that since said payment, enough had been collected from others than the defendants, to repay the said sum paid by the committee. In rebuttal the plaintiff proved that the condition on which the subscriptions were made was, that the agent who obtained them should get all he could, and each subscriber should receive back his ratable proportion of whatever excess should be realized over the sum of fifteen thousand dollars. The court rendered judgment for the plaintiff for the balance of the defendants' subscription, deducting their proportion of the excess of the available subscriptions, and the defendants excepted.

Peck, for the defendants.

Smith, for the plaintiff.

By Court, WILLIAMS, C. J. This is an action brought to recover the sum subscribed by the defendants, towards building a state-house in Montpelier. The subscription paper contained a contract between the state and the individual subscribers, and, if liable to none of the objections which have been urged, must be enforced. Here were parties *in esse*, capable of contracting. If the subscription was made before the passing of the act of the legislature, in 1832, it was in the nature of a proposition to the state, that the several subscribers would pay the several sums annexed to their names, if the state-house should be erected in Montpelier. If made after the passing of the act, it may be considered as accepting the proposition, emanating from the legislature, in the providing clause of the first section of the act, and providing the funds for that purpose. In either event, when the terms of the act were complied with, the contract between the state and the subscribers was mutual and equally binding. From the decision of the court, in the case of *The University of Vermont v. Buell*, 2 Vt. 48, it appears that such contracts are not void, for want of a consideration; and it is to be observed that all the cases from Massachu-

setts, which the defendants have read, were before the court on the hearing of the case against Buell.

Of the propriety of a contract of this kind, between the state and individuals, it does not become us either to inquire or express an opinion. The doings of the legislature, when not liable to constitutional objections, are to be respected by the other branches of the government, and their wisdom or propriety is not to be questioned by a co-ordinate branch. The propriety of any particular location of public buildings may depend, in some measure, upon the sum proposed to be given by the citizens of any place. The public interest obviously requires that such location should be made with a view to all the circumstances, and the greater or less burden to the whole state would be an important circumstance to be taken into consideration, in determining between several places, in other respects equally convenient. The increased value of the property, in the vicinity of public buildings, would seem to require that those, who are benefited, should contribute some part of this increase, for the purpose of erecting them, rather than that the whole advantage should accrue to them, and the expense be wholly borne by the citizens generally. We can see no foundation for the objection made to this subscription, on the ground of public policy or propriety.

That the action may be brought in the name of the treasurer, appears from the eighteenth and nineteenth sections of the statute constituting the treasury department. It is a suit for money due on simple contract, and by that statute may be brought either in the name of the people of the state, or in the name of the treasurer.

It only remains to consider the defense relied on by the defendants; and we are of opinion, that it can not avail them, either that the committee of the subscribers paid to the state the whole sum of fifteen thousand dollars, which they had secured, or that the sum, collected by the committee of the other subscribers, was sufficient to repay the sum by them actually paid over. The payment made by the committee was not a payment made by the individual subscribers. The claims of the state may have been satisfied by the payment of the bond, but the subscription was, both before and after that payment, held by the committee, as in trust for the benefit of the signers of the bond. The cases are numerous, where a debt or claim has been paid to the creditors, and the securities kept alive for the benefit of others interested, and suits have been

maintained on those securities. If a judgment is rendered against a sheriff for an escape, the judgment against the debtor is frequently, by order of court, assigned to the sheriff: *Oliver v. Chamberlin*, D. Chip. 41. The principle was recognized in the case of *Allen v. Holden*, 9 Mass. 133 [6 Am. Dec. 46]. Further, from the nature of the subscription it is very apparent, that the defendants could not resist the action, on the ground that the committee had already collected of the subscribers the whole sum, for which the bond was executed. Each subscriber agreed to pay a definite sum, and if the aggregate exceeded the amount required, the subscriptions should abate, *pro rata*, and no one subscriber could have the whole benefit of the excess. The agreement among the subscribers, to this effect, was only what the law would have enforced without such agreement, in case the subscriptions exceeded the amount required.

The result is, there is no legal objection to the right of the plaintiff to recover of the defendants on the subscription paper, after deducting their proportion of the excess of the available subscriptions, either arising on the contract itself, or on the facts given in evidence by the defendants; and the judgment of the county court, which was conformable to this view, must be affirmed.

Cited, approved, and followed in *Carpenter v. Mather*, 3 Scam. (Ill.) 376.

DIXON v. OLMSTEAD.

[9 VERMONT, 310.]

FUGITIVE FROM JUSTICE, WHO, BEING ABOUT TO BE ARRESTED and surrendered in obedience to the laws of this state, pays money and other property to the party aggrieved, for the purpose of compounding and stifling the prosecution, can not recover back such money or property.

BOTH PARTIES ARE, IN SUCH CASE, IN PARI DELICTO, and the law will not aid either.

TROVER for a horse. The defendant sent his agent from New Hampshire to procure the arrest and surrender of the plaintiff, to answer to the charge of forgery in that state. Said agent had procured the warrant of two justices of the peace for that purpose, and threatened to arrest the plaintiff, when the latter agreed to pay to him one hundred and fifty dollars, in part payment of which sum the horse was delivered to defendant's agent, who thereupon agreed not to prosecute the indictment for forgery. The court decided that if the jury believed the evi-

dence, the defendant was entitled to recover; to which decision the plaintiff excepted. The other facts appear from the opinion.

Davis, for the plaintiff.

Matlocks, for the defendant.

By Court, REDFIELD, J. The principles applicable to cases of this character are very well settled. The only difficulty here is in determining to which class of cases this belongs. If this is to be treated strictly as a compounding of felony, and, as such, an indictable offense, it is past all controversy that the plaintiff can not recover. For both parties are to be considered *in pari delicto*, and the case will then be determined by the well-known maxim, *potior est conditio defendentis*. It needs no labored argument to show the doctrines upon this subject, or the reasons upon which they are founded. They are too familiar with the profession to require much comment.

Whenever a contract has for its object the contravention of the express provisions or prohibitions of some statute, or any other act or omission, which is against good morals and not allowable in the forum of conscience, or subversive of sound, wholesome policy in government, such contract, while it remains executory upon both parties, is of no binding force whatever, and both parties are, in contemplation of law, the same as if the contract had never been made. But if the contract had been executed on the one part, by the payment of the consideration of the corrupt agreement, and the other party refuses to perform his stipulations, no action can be maintained against him, either upon the contract or to recover back the consideration. These principles have been long established, and upon reasons of the soundest policy.

There are some few cases of exception to these general rules, by express statutory provisions, such as money lost at play, which may be recovered back again by the losing party, although he is admitted to be equally in fault with the other party. This exception is one founded on a higher policy than the rule itself. There are other cases, in which the party paying his money is treated as the oppressed party, and is permitted to recover back money paid, on the ground of some supposed infirmity or some peculiar liability to outrage or extortion, from the circumstances in which he is placed at the time.

Thus, in the case of a usurious loan, the party, paying interest beyond the legal rate, is allowed to recover back the amount, as so much money extorted from him by a supposed duress

of circumstances, although it must be admitted the money was paid voluntarily and in direct contravention of the express provisions of the statute. And in the same light are viewed illegal wagers, before the money is paid over to the winning party, also money paid for the illegal assurance of lottery tickets, and money paid to induce creditors to sign the commission, or to aid the bankrupt in obtaining his certificates. But these are all considered as excepted cases, on the ground of some superior policy in the rule excepting these cases from the general rule.

In many of the cases there is an express statutory exception, and others are so similar, as not to be distinguished from them. But the present case is one which could not strictly have occurred at common law. It is not precisely a compounding of felony, and the indictment in the county court, charging the offence as such, was held insufficient, on the ground that no felony had been committed within our jurisdiction. And still it can not be admitted, that the transaction was an innocent one, on either side. Our legislature, previous to the provisions made by congress on the subject, did provide for the surrender of fugitives from other states. This was to be made by the warrant of any two justices of the peace, of the county where the arrest should be made. It was under this statute the defendant was proceeding to bring the plaintiff to trial for an alleged felony, committed in the state of New Hampshire. For the purposes of this trial, it must be considered first, that the plaintiff was guilty of the offense. For if when he was threatened only with legal process, and the ordinary proceedings in such cases, he saw fit to come forward and compromise the matter, it is not in his mouth to deny his guilt. (And it was so held in *Swasey v. Mead and Chase*, Orleans Co. Sup. Ct., March term, 1832.) And again, if the plaintiff saw fit, as in this case, to give in evidence the declarations of defendant and his agent, that he had procured warrants in New Hampshire and in this state, to arrest the plaintiff on this charge, these declarations thereby became evidence, and as the verdict was directed, on the ground that the jury should believe all the evidence, it must be considered that such warrants had been taken out in the manner alleged.

Hence the plaintiff in this case is to be treated as a fugitive from justice, just about to be arrested, and surrendered in obedience to the laws of this state, for his trial in another jurisdiction. In this state of the case, the plaintiff pays money and other property to defendant, for the purpose, and with the

agreement to compound and stifle this prosecution. It is not pretended that defendant threatened the plaintiff with any other than a legal and usual prosecution for the offense. And no man can be considered as under duress, when he is threatened, or indeed visited by the ordinary modes of legal process, either in civil or criminal proceedings. Our legislature have seen fit to institute this mode of securing the surrender of fugitives from justice. The policy of such a law is very apparent. It is desirable, above all things, that the state should never prove a sanctuary for crime, a refuge for the guilty violaters of just laws, either here or elsewhere. Such, undoubtedly, would be the case, if no provision for surrendering fugitives from justice existed. And where such laws do exist, it can not be doubted that compounding a prosecution under them is indictable as a high misdemeanor. And it is certainly difficult to see why the parties are not *in pari delicto*. An innocent man seldom wishes to prevent the ordinary course of justice. And whether the accused be innocent or guilty, it can not be admitted, that any right whatever exists to counteract or resist the operation of the law.

Such contract could hardly be less immoral, nor could it be less against sound policy, than if there had been the compounding of a felony committed here. The fact that the forgery is considered as committed within the territorial limits of another jurisdiction, and, of course, technically not against our law, does not, in any sense, justify the offender in buying off from a regular prosecution for the offense, nor justify the courts in giving countenance to the transaction, by aiding the party in recovering property, surrendered in furtherance of such an illegal contract.

Nor do we feel warranted in treating the plaintiff as the innocent victim of the defendant. Every man here knows his rights, and knows, and feels too, that those rights are held sacred, not only by our own tribunals, but equally in our sister states. If innocent, he has a right to expect an acquittal; if guilty, he may or may not be convicted, but in neither case can he feel warranted in bribing the first minister of justice (as the party aggrieved always will be), not to institute, or to discontinue a prosecution already instituted.

We know, indeed, that an innocent man may, from want of firmness, or want of trust in the fairness of our tribunals or the integrity of witnesses, or from horror at being suspected of crime, be induced to pay money, even perhaps to compound

and stifle a prosecution. But, however innocent one may be of the offense charged, such an escape could not fail to involve the party in almost equal guilt with the actual offender. And we do not perceive any such constraint in the present case as would be likely to enable persons to extort money at will from the innocent, although not unsuspected. What has been said has not been done with any intention to cast suspicion upon the character or conduct of any one, but from necessity to show the degree of guilt attaching to the plaintiff's conduct. And, at the same time, it is apparent the defendant does not escape through his own innocence, but because the plaintiff's hands are too corrupt to handle the price of guilt, which he must therefore lose, and which the defendant retains from necessity, and against the laws both of honor and good conscience.

The judgment of the county court is therefore affirmed.

CONTRACTS, CONSIDERATION OF WHICH is non-prosecution for crime: See note to *Town of Hinesburgh v. Sumner*, ante, 599. The principal case is cited in *Hirman v. Woodruff*, 11 Vt. 593, to the point that a contract, the consideration of which is the compounding of a crime, is void; and in *Tufts v. Tufts*, 3 Woodb. & M. 503, to the point that if to uphold a sale would be mischievous, courts will not enforce it, although it is not by any law declared to be void.

BEECHER v. PARMELE.

[9 VERMONT, 352.]

DIVISIONAL LINE BETWEEN DIFFERENT PROPRIETORS of an entire lot, in possession of separate parcels thereof, is established by their acquiescence therein for fifteen years.

SUCH LINE WILL BE CONSIDERED AS DRAWN THROUGH THE CENTER, leaving the two parts as nearly equal and similar as possible, unless the parties manifest their acquiescence in a line drawn in some other way.

OWNER OF LAND, HAVING RIGHT TO IMMEDIATE POSSESSION, may forcibly expel an intruder, and his possession obtained by so doing is lawful.

DECLARATIONS OF PERSON WHILE IN POSSESSION OF LAND, whether as tenant or proprietor, as to the manner in which the land was occupied, are admissible as against himself or those claiming under him.

SUCH DECLARATIONS MAY BE PROVED BY THE TESTIMONY of persons other than the one who made them.

TRESPASS on the freehold. Plea, the general issue. The plaintiff had title to the southerly half, and the defendants claimed title to the northerly half of lot No. 4 in Canaan. The lot was in the form of a triangle nearly equilateral. The parcel of land in dispute was first partly cleared by defendants, claiming to hold as tenants of one Buckminster, who had a deed to

the northerly half of said lot. The testimony tended to show that the lot had never been divided, but that plaintiff and defendants, and those under whom they claimed, had occupied it in severalty for more than twenty years, one claiming the south and the other the north half, each having made improvements near the point of a line from one apex of the triangle to the middle of the opposite side. Upon this part of the testimony, the court instructed the jury that, if for more than fifteen years, the parties occupying the different parts of the lot had acquiesced in an equal division of the land by a line passing in that direction, the jury should consider the line of division drawn from the apex of the triangle to such a point in the opposite side as would leave the quantity of land equal on both sides of the line. There was also testimony tending to show that more than thirty years ago the land had been divided by actual survey, and a line spotted, which had ever since been acquiesced in by the occupiers of the two lots. The jury were instructed that if this was the case, this line would govern, although there might be more land on one side than on the other. There was testimony tending to show that the defendants afterward partly cleared the piece of land in dispute, when the plaintiff forcibly took possession of it, and occupied it until the defendants entered and committed the trespass charged in the declaration. Upon this point the court charged that if the land was the plaintiff's, and he was in quiet possession, and the defendants entered forcibly upon him as stated, he should recover. There was testimony going to show that one Boothe, while in possession of that half of the lot occupied by the defendants, some thirty years ago, admitted the existence of a dividing line which would not include the parcel of land in dispute in his half. The jury were instructed to weigh this testimony for the purpose of determining what line of division, if any, had been acquiesced in by the occupants of the two parts of the lot. To these instructions the defendants excepted.

Bartlett, for the defendants.

Heywood, for the plaintiff.

By Court, REDFIELD, J. If an entire lot be owned by different proprietors, who are in possession of separate parcels of the lot, and a divisional line is acquiesced in for fifteen years, it is thereby established. If no line of division be in fact drawn, but the parties acquiesce in an imaginary line of division, this is the same as if the line had been marked by visible

monuments. If a person own the whole of a lot, and convey a given number of acres off one end, or one side, this is to be understood by a line parallel to the lot line. If two own a lot in equal portions, in severalty, but in fact not divided, and enter on extreme parts of the lot, each upon his own portion, it will be considered, that they intend a division by a line drawn through the center, leaving the two parts as nearly similar, as they can be and be equal. These propositions in relation to conveyances have been considered as settled, for many years. In Orleans county, on the last circuit, it was decided, that the levy of an execution upon a specified number of acres, "off of the east end" of a lot, the lot being in a rectangular form, was a sufficient description by metes and bounds. And in the present case, the parties owning equal parts of the lot, and having evinced an acquiescence in a similar divisional line, drawn from one apex of the triangle, it must of course be drawn to such point in the opposite side, as will divide the land equally.

The question whether the defendants had such a previous possession of the land in dispute, as will prevent their being sued as trespassers, does not seem very different from the main question in the case. If the defendants had possession of the land first, and had equal right to the land, they should, and under the charge of the court, would have recovered. If they went into possession without right, and as mere trespassers upon the plaintiff's rights, he having a superior right to the land, he might well put the defendants out of such wrongful possession, and if he did it by force even, he would acquire a rightful possession, and would, at most, only be liable for a breach of the peace, or a trespass upon the person of defendants. It was formerly considered that the proprietor of land, who found an intruder in quiet possession of the same, must resort to his legal remedy, and could not forcibly expel such wrong-doer. But it is now well settled, that such intruder may be forcibly expelled, so far as the land is concerned. If the owner of the land is guilty of a breach of the peace, and trespass upon the person of the intruder, in so doing, he is liable for that, but his possession of the land is lawful, and he may maintain it, or sustain any proper action for an infringement of it.

The declarations of Boothe, while in possession of the land, whether as tenant or proprietor, were correctly admitted. It was material for the jury to determine whether any divisional line had been acquiesced in. Boothe had been in possession of

the portion claimed by Buckminster, and in the chain of occupants, under whom Buckminster claimed, and, while so in possession, had disclaimed all pretension to hold or occupy the land in dispute, by pointing out a different line. It does not appear that he had been in possession for fifteen years, but he and others had been in continued possession of the portion of the lot, claimed by Buckminster, for more than fifteen years, and the line claimed by them was important to be ascertained. This could only be done by knowing what claims or declarations, in regard to the line, they had made while in possession. These claims or declarations were the facts for the jury to find. Their force did not depend upon the veracity of the person who made them; for whether Boothe had been false or fair spoken, was all the same. The question was, did he make the declarations, or, in other words, was a line acquiesced in by both the claimants, giving the land in dispute, to plaintiff—and this for more than fifteen years? If so, that line became conclusively established. That can only be determined by knowing what claims the several occupants made, while in possession of the land. This is much like the case of an agent, who goes to another for the purpose of making a demand or giving notice. The declarations of the agent, at the time and place, and to the opposite party, are the facts to be found. The agent may be called or not, at the option of the party. If called, the party is not bound by his testimony. If he denies making the demand or giving the notice, other witnesses may be called, or they may be called in the first instance. So, had Boothe been called, and denied making these declarations, the plaintiff might still have shown by other witnesses, that he did, in fact, make them.

Judgment affirmed.

Cited and approved in *Rich v. Elliot*, 10 Vt. 213, as to the manner of laying off a parcel of land from a larger tract.

DIVIDING LINE, SETTLEMENT OF: See *Kip v. Norton*, 27 Am. Dec. 120, note 121, and the cases there collected.

DECLARATIONS OF PERSON IN POSSESSION OF LAND, when evidence on questions of boundary: See *Coate v. Speer*, 15 Am. Dec. 627, note 628; *Jackson v. McCall*, 6 Id. 343.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BROWN v. BONNER.

[8 LEIGH, 1.]

MISTAKE OF A PERSON will not in equity be permitted to benefit him, at the expense of those who were injured by the mistake. Thus where an intended wife requested her future husband to procure for her a deed, whereby she might settle certain property upon a sister, and he thereupon procured for her a defective deed, the deed will in equity, after the marriage and subsequent death of the wife, be set up against the husband who by the marriage obtained the property which the deed purported to settle.

BILL in equity. The opinion states the case.

Leigh, for the appellants.

Johnson, contra.

TUCKER, P. The original bill in this case states that upon the intended marriage of the appellee Bonner with Susanna W. Atkinson, it was agreed that a provision should be made out of her estate for her half sister, who afterwards intermarried with the complainant Brown. The sum fixed upon was two thousand two hundred dollars, and the personal estate of the intended bride was ample for its payment. In this bill the transaction is considered as having amounted to a gift, and as having operated to intercept the marital rights of the appellee. This view of the case was, I think, obviously incorrect; and as the evidence afterwards taken abundantly shows, it did not present the rights of the female complainant in their proper aspect. An amended bill was afterwards filed, in which it is stated, in

strict conformity with the facts as proved by the depositions taken anterior to its exhibition, that "after it had been agreed between the intended husband and wife that a sum of money should be given to and settled upon Miss Tatum (now Mrs. Brown), the appellee, at Miss Atkinson's request, had an instrument of writing prepared to carry the intended settlement into effect, and brought it in blank to Miss Atkinson, who did not execute it for some supposed informality; whereupon Bonner, the intended husband, said to his intended wife, that he would have an instrument drawn by a lawyer which would answer the intended purpose, and afterwards produced the instrument now deemed incompetent to bind him, which was executed accordingly." These allegations are beyond controversy, because the bill has been taken for confessed against the appellee.

Upon these facts, I can not hesitate about the conclusion to be drawn in that tribunal which considers that as done which ought to have been done—which holds itself bound to rectify mistakes—and which looks upon fraud with no grains of allowance. I can have no doubt that the benevolence of the deceased sister must be effectuated in favor of the survivor, and that the appellee is justly chargeable with the payment.

It is objected however, in the first place, that it does not appear that the design was that the money was to be paid to Miss Tatum out of the personalty of her sister, and that the intent to provide for her might as effectually have been executed by a covenant binding her heirs, and thus charging her realty. Such, in my view, was obviously not the design of the parties. An engagement to make a provision in money would naturally refer itself to the personalty, in the absence of positive evidence, even if the circumstances did not strongly prove that the personalty was looked to. But when we take into view that Miss Atkinson had a large sum in the hands of her guardian, besides a personal estate of four or five thousand dollars which Bonner received after the marriage; when we see him procuring an instrument to be drawn, having not the remotest reference to the realty, and not even binding the heirs for payment; when we see him also, during the coverture, making advances in part of this gift, which are not pretended to have been raised out of the realty, and which he does not even now seek to charge upon it; credulity itself can not believe that the real estate was looked to by the parties as the fund from which payment was to be made.

Taking then the agreement to be that two thousand two hun-

dred dollars should be given to and settled upon Miss Tatum out of her sister's personalty, and that the intended husband undertook to have an instrument drawn by a lawyer, which should answer the intended purpose, but in fact produced, and had executed an instrument of writing wholly inadequate to the purpose; there can be no doubt, I think, that such agreement should now be set up against the husband.

Had the husband fraudulently procured a defective instrument, knowing it to be such, and in the confidence and agitation of the moment procured its execution, to the prejudice of the half sister, no language could have been too strong in denouncing his iniquity. It is not believed that he could have done so. Yet it was justly said in the argument, that the fraud is not less great to endeavor now to take advantage of his own blunder and mistake, however innocent. No principle is in equity better established than this, that though there may have been no fraud in the original transaction, yet the attempt to enforce it may become a fraud. Where one is not even originally a party to the transaction, yet if it was effected through fraud, he becomes a party to the fraud by seeking to have advantage of it. Such was the case of *Huguenin v. Baseley*, 14 Ves. 273, and *Marbury v. Brooks*, 7 Wheat. 556. And surely the case is not less strong of one through whose mistake another has been severely injured, and himself in an equal degree benefited, and who afterwards seeks to avail himself of that mistake to the prejudice of his adversary.

Had the transaction originated in fraud, there can be no doubt that the appellee would be chargeable. In the ordinary case of an estate suffered to descend, the owner being informed by the heir that if the estate is permitted to descend he will make provision for a third person, there is no doubt the court of equity would compel the heir to discover whether he did make the promise, notwithstanding the statute of frauds, and would force him to comply with it, notwithstanding the third party is a volunteer. See *Strickland v. Aldridge*, 9 Ves. 519; *Luttrell v. Olmius*, quoted and approved in *Mestaer v. Gillespie*, 11 Id. 638; 2 Freem. 34, 285; *Chamberlain v. Agar*, 2 Ves. & B. 262. In the case of *Luttrell v. Olmius*, the party claiming was a volunteer, and yet he had relief. Why? Because he was not seeking relief against the giver, whom a court of equity will not compel to part with his property upon a naked promise without consideration, but because he sought it against a party who received the property upon the express consideration of applying

it to his use. Who ever heard of a trustee setting up against his *cestui que trust* the defense that the latter was a volunteer? It can not be; because, although the *cestui que trust* may be a volunteer, there is a sufficient consideration to justify a decree against the trustee. So in the case of *Luttrell v. Olmius*, though the claimant was a volunteer, yet as the tenant in tail could not in conscience take advantage of the iniquitous act, the obligation of conscience stood in lieu of a consideration, and the estate was considered precisely as if the act had been done which ought to have been done. And so here, though Miss Tatum is a volunteer, and could not have filed a bill against her sister to rectify the settlement, she may well maintain her demand against Bonner, to whom his wife had given her whole personalty by marriage, upon the consideration of his agreeing to make a valid settlement upon the sister. I consider that settlement as if duly made, and the appellee of course as bound for the balance of the sum remaining unpaid; and am therefore of opinion to reverse the decree and send the cause back for further proceedings.

Decree reversed, and cause remanded for further proceedings.

BROCKENBROUGH, J., absent.

CALLAWAY v. ALEXANDER.

[8 LEIGH, 114.]

RELIEF IN EQUITY—REQUEST OF A DEFENDANT TO AN ATTORNEY TO REPRESENT HIS INTERESTS in a chancery suit, brought to obtain an account from him in his capacity of executor, without accompanying the request with the vouchers and information necessary to enable the attorney to make a defense, will not entitle him to relief upon the ground of accident and surprise, against a decree obtained against him in the suit three years after the service of process, upon his showing that soon after his request to the attorney the latter died, without his knowledge, and without having done anything in the matter.

BILL to obtain relief against a decree previously obtained by defendant Alexander against complainant. The suit in which the decree was obtained sought an account against complainant in his capacity of executor of the estate of James Callaway, deceased, and sought to establish that he had in his hands funds sufficient to discharge a certain legacy for five hundred pounds, bequeathed by said Callaway's will. The process in this suit was served June, 1828. The final decree in the suit establishing the rights of the plaintiff therein as prayed for, was rendered

in May, 1831, after a reference to a commissioner to take the accounts. Plaintiff alleged that after the service of process, he had requested Mr. Mennis, an attorney, to attend to his interests in the matter, but that soon after Mennis died without the knowledge of plaintiff, and without having done anything in the matter, whereby it became possible to obtain a decree against him. He asserted that he had no sufficient funds of the estate in his hands to pay the legacy, and also alleged other matters which it is unnecessary to mention. An injunction was granted against the decree as prayed for, but the injunction was afterwards dissolved. Plaintiff appealed.

Leigh, for the appellant.

Grattan and Johnson, contra.

TUCKER, P. I have struggled hard to sustain the appellant's claim to be heard in opposition to the decree by default, but I do not think it can be done. The appellant can not be entitled to relief after his gross neglect. The process was served upon him in June, 1828; the bill being filed before the return day. The decree for account was not entered until October, 1829; so that he had fifteen months to file his answer. His counsel could not file one for him. But it is said, an answer was not necessary; a defense before the commissioner was all that was necessary. Admit it: but how was the counsel to make this defense, unassisted by his client, and unsustained by a single voucher? The sickness or death of Mr. Mennis was not then the true cause of the appellant's being undefended. Had he been in health, and before the commissioner, he could have made no defense for him, since it is not pretended that he was furnished with information or vouchers. It would be going farther than we have ever gone if a rehearing were awarded to a party who has so grossly neglected his defense. I consider the case as analogous to injunctions to judgments at law, alleged to have been obtained by accident or surprise; and I am not of opinion that the practice of the court would, when most loose, have justified an interference in a case like this. Averse as I am to too much rigor in the application of the rule which denies relief to a party who has neglected his defense, we should fall, I think, into the opposite error, if we were to indulge a party who has utterly neglected his case for three years, having in the whole course of that time neither seen nor communicated with counsel, nor supplied him with a voucher or an account. And although it may be true that he never heard of the notices to take the account

or the deposition, yet as he knew of the existence of the suit, it was his duty, either to inquire as to its progress, or to take that newspaper which was likely to give information. The provision of the act which declares such notices valid and sufficient would be altogether nugatory, if parties were afterwards permitted to deny notice.

As to the form of this proceeding, I see no objection: see *Sheldon v. Aland*, 3 P. Wms. 110; and still less to the principle of the cases of *Erwin v. Vint*, 6 Munf. 267, and *Kemp v. Squire*, 1 Ves. sen. 206. Those cases appear to me to sustain the true principle of equity, which relieves against accident and surprise, and is more solicitous to come at justice between the parties than to adhere to a harsh and rigorous rule, which in very many instances subverts the views of the sharper, rather than make a grain of allowance for omission or neglect. In this case, I am consoled by the hope that this ample estate was sufficient to pay the legacy of the testator's daughter, and that the appellant is in no danger of ultimate loss. At least, he will merit it, if it be incurred. I am of opinion to affirm the decree.

BROCKENBROUGH, J. I concur in the opinion of the president.

The other judges concurring in the opinion that the decree should be affirmed, it was affirmed accordingly.

EQUITY WILL INTERFERE AGAINST JUDGMENT OBTAINED AT LAW, WHEN: *Oliver v. Pray*, 19 Am. Dec. 603, note. Equity will not relieve against a judgment that has been rendered possible by neglect, as by failure to make the proper defense at law: *Armstrong v. Cheshire*, 24 Id. 273; *McClure v. Miller*, 21 Id. 522; *Kearney v. Smith*, 24 Id. 550; *Haughy v. Strang*, 27 Id. 648.

SKIPWITH, EX'R, v. CUNNINGHAM.

[8 LEIGH, 271.]

LIEN OF A JUDGMENT UPON LANDS relates to the first day of the term at which it was rendered, and overreaches intermediate deeds of trust or other incumbrances.

COMMENCEMENT OF TERM to which lien of judgment has relation is the first day of the term upon which the court sits.

ASSIGNMENT FOR BENEFIT OF CREDITORS may lawfully give preference to certain of their number.

ASSENT OF THE CESTUI QUE TRUST TO A TRUST created in his favor will be presumed, and therefore the estate vested in his trustee is not overreached by the lien of a judgment obtained against the grantor, intermediate the creation of the trust estate, and the acts of the beneficiary indicating his assent to the trust.

TRUST CREATED UPON THE VESTING OF THE LEGAL TITLE in the trustee, can not be destroyed otherwise than by the renunciation of the *cestui que trust*.

EQUITY, PRIOR IN POINT OF TIME, WILL BE GIVEN THE PREFERENCE, where a fund subject to several equities is sought to be reached.

ASSIGNMENT EXACTING A RELEASE of their demands by creditors, as a condition precedent to their sharing its benefits, is valid, if the assignment is of the whole of the debtor's property, and the fund so created is directed to be applied, *in toto*, in discharge of the debts due assenting creditors.

PROVISION IN AN ASSIGNMENT FOR BENEFIT OF CREDITORS, that repayment shall be made to the assignor of the surplus left after the complete discharge of the debts of all assenting creditors, is void, in so far as it attempts to protect such surplus from the claims of the non-assenting creditors; but will not invalidate the assignment as to the assenting creditors.

CREDITORS LEFT UNSECURED BY AN ASSIGNMENT, are entitled to an account of the property, in order that it may be determined whether there is any surplus out of which to pay their indebtedness.

BILL in equity. By deed, bearing date October 13, 1827, Cunningham conveyed to Brodnax and Osborne all of his property, real and personal, and all debts due to him, in trust, that they might, by the sale of the property and the collection of the debts, raise a fund wherewith to discharge in full certain specified claims, and the surplus of which they should then apply *pro rata* to the discharge of the debts of all such creditors of Cunningham, as might, within the next four months, signify their assent to the terms of the deed, by executing a release, to be appended thereto, releasing Cunningham from all liability for any portion of their claims that might be left unpaid after the application to their discharge of the proceeds of the entire property included in the deed. The deed provided that any surplus left after the discharge of the claims of the assenting creditors, should be paid over to Cunningham. The deed also reserved to Cunningham, from the debts due him, the sum of three hundred and fifty dollars, expressed in the deed to be for the purpose of enabling him to pay off certain unliquidated demands against him of high honorary obligation. In February, 1828, the release was executed by several of Cunningham's creditors, all on or before the thirteenth of February, and so within the four months provided for in the deed. The trust deed above mentioned, though dated the thirteenth of October, appears to have been executed on the fifteenth of the month. The plaintiff in the present bill obtained a judgment against Cunningham in the superior court of Petersburg at the October term, 1827. The commencement fixed by law for this term was

the fifteenth of October, but the judge did not actually attend the court at the term before the seventeenth. Plaintiff contended, that under the circumstances, the lien of his judgment overreached the trust deed, and therefore this property, or the proceeds of its sale in the hands of the trustees, was liable to its discharge. He also contended, that the provision in the deed that its benefits should be shared by only such creditors as should execute a release, was fraudulent and void, and that, therefore, he was, at all events, entitled to the same *pro rata* share of the proceeds of the estate conveyed that he would have been had he executed a release. The bill concluded with a prayer for general relief. Cunningham and his trustees, Brodnax and Osborne, were the parties defendants to this bill. Answers were put in by them. The chancellor being of opinion that upon this case the plaintiff was not entitled to relief, dismissed his bill. Plaintiff appealed.

J. Robertson, for the plaintiff.

Johnson and Macfarland, contra.

TUCKER, P. The counsel in this case have very laboriously discussed a question which appears to me to have been completely closed by the well-considered decisions of this court. In *The Mutual Assurance Society v. Stanard*, 4 Munf. 539, the court were of opinion that the lien of a judgment upon the lands of the party relates back to the commencement of the term at which it is obtained, and overreaches a deed of trust or other incumbrance on the land, executed on or after the first day of the term. In the case of *Coutts v. Walker*, 2 Leigh, 268, the counsel for the appellant, suggesting that the point had not been argued in the case of *The Mutual Assurance Society v. Stanard*, and that it ought not therefore to be considered as settled by that adjudication, they were permitted to argue it at length; which was done with much ability. The opinion of the court, consisting of four judges, was unanimous, and was delivered by Judge Green, who, with his accustomed ability, investigated the doctrines of the common law on the subject very fully, and concluded with declaring that the former decision was right, and ought to be adhered to. After this deliberate judgment of the court, affirming the principle which had been settled in a former case, I think the question should not have been suffered to be again stirred; for it must be remembered that this is not a mere question of practice. The principle is in effect a canon of property, and directly involves, in various

instances, the title to real estate. It is unnecessary, then, that we should enter into this investigation anew, or follow the counsel through all their learned arguments, though I am well satisfied, if we did so, we should arrive at the same result that our predecessors have done. The very enactment of the statute 29 Cha. II., c. 3, secs. 14, 15, is proof of the fact that by the common law the judgment of the court related back to the first day of the term; and the judgments of the courts, both before and since, show that this common law principle was without question, and was not even altered by the statute, except for the protection of purchasers: See *Odes v. Woodward*, 2 Ld. Raym. 849; 2 Bac. Abr. 731; *Bragner v. Langmead*, 7 T. R. 20.

But admitting that the judgment relates back to the first day of the term, I can not persuade myself that we ought to consider the term as commencing on the day appointed by law for its commencement, although in point of fact the court was not held until the third day afterwards. There is no analogy between such a case, and the essoin days of the term in the English courts; and the extension of the fiction of relation, to embrace a period when the court was to no intent whatever in session, would be unreasonable and without precedent. I should certainly be averse to any such extension, having in fact very great doubt of the wisdom of the fiction at best; and as there is no precedent to bind me, I shall not be the first to make one. I shall consider the judgment as relating back to the first day of the term, and the first moment of that day; but I look upon the day on which the court commenced its session as being the first day of the term.

This brings us to consider the deed; for it was executed the day before the commencement of the court; and indeed it was acknowledged by Cunningham, and delivered to the clerk to be recorded, before the term began. It was not therefore overreached by the judgment. It has, however, been assailed on various grounds; all of which it will be proper to examine.

First it is alleged that it was executed with intent to delay, hinder, and defraud the plaintiff and other creditors, and so was void under the act for prevention of fraudulent conveyances. I see no evidence of this whatever. A merchant in failing circumstances may, it is admitted, prefer one class of creditors to another, and in doing so, he must, in a degree, impede, hinder, and even injure other creditors. But the case is not within the statute, which, having excepted conveyances

made *bona fide* and upon valuable consideration, has always been held to permit this preference. The legality of such an arrangement is too well settled to be now called in question: *Hendricks v. Robinson*, 2 Johns. Ch. 283, 306; *Hopkins v. Grey*, 7 Mod. 139; *Estwick v. Caillaud*, 5 T. R. 420; *Nunn v. Wilmore*, 8 Id. 521; *Meux v. Howell*, 4 East, 1; *McMenomy v. Murray*, 3 Johns. Ch. 435; *McMenomy v. Roosevelt*, Id. 446; *Williams v. Brown*, 4 Id. 682; *Brashear v. West etc.*, 7 Pet. 614. In this last case Chief Justice Marshall said: "Such preference, though liable to abuse and to serious objections, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained. It can not be treated as a fraud."

Next it is alleged, that the deed is of no binding validity, because it was not assented to by those for whose benefit it was executed, before the lien of the judgment attached; that it was, therefore, to be considered as a voluntary deed, and, as such, void as to the plaintiff and the other creditors of the grantor. My impressions are otherwise.

Blackstone, following the footsteps of those who went before him, enumerates the various requisites to a valid deed, and among them he places delivery. It is observable, however, that acceptance is not enumerated as one of the essentials. Delivery indeed to the grantee himself implies acceptance by him; but as such delivery is not always to him in person, the necessity of immediate acceptance is not implied in the necessity of a delivery. Delivery is indeed absolutely necessary to a deed. It is the final act, the formal declaration of the grantor's determination to complete the conveyance or enter into the contract. See *Sharrington v. Shotton*, Plowd. 308: "First there is a determination of the mind when a man designs to pass a thing by deed, and upon that the party causes it to be written, which is one part of deliberation; sealing is another, and delivery is the consummation of his resolution." There is no particular form essential to constitute a good delivery, but any act, I conceive, which conveys the evidence of this consummation of the grantor's resolution will suffice. On principle, then, it would seem a solecism to say that this last act or consummation of the grantor's resolution should depend upon the act of another person—the grantee. That act indeed can not compel the grantee to take against his will, but it is, as to the grantor, a complete and consummate act before that will is declared, although it may be avoided by the dissent of the grantee. No

man indeed can be forced to take an estate against his will; but the law on the other hand presumes that every estate, given by will or otherwise, is beneficial to the party to whom it is given, until he renounces it: *Townson v. Tickell*, 3 Barn. & Ald. 31; *Will v. Franklin*, 1 Binn. 502, 518 [2 Am. Dec. 474]. And hence the assent of the grantee is implied in all conveyances; first, because of the supposed benefit; secondly, because it is incongruous and absurd that when a conveyance is completely executed on the grantor's part, the estate should continue in him; thirdly, to prevent the uncertainty of the freehold: 4 Cru. Dig. 11.

In *Thompson v. Leach*, 2 Vent. 198, three of the judges held that an estate did not pass by surrender, till the surrenderee accepted it. Ventriss differed, and held that it passed immediately, liable to be divested by dissent; and his opinion was followed by the house of lords. Accordingly, while, on the one hand, acceptance is not essential to give validity to a deed, on the other, dissent is one of the modes of avoiding it, laid down in the books: 2 Bl. Com. 309; 4 Cru. Dig. 494. Now this implies its validity and effect, until avoided by dissent; and hence it is laid down that deeds, immediately upon the execution by the grantors, divest the estate out of them, and put it in the party to whom the conveyance is made, though in his absence and without his notice, till some disagreement to such estate appears: *Id.* 11. Of this, indeed, we have many familiar instances. If an estate be conveyed, either by common law or statutory assurance, to A. for life, remainder to B. in fee, the remainder passes at once to B., and upon A.'s death the frank-tenement will be adjudged in him until he disagrees or disclaims; and by waiving thereof it vests in the donor or his heir. In like manner a devise vests the title in the devisee until disagreement, and then the dissent has the effect of defeating the devise by relation to the testator's death: 3 Barn. & Ald. 31. So if an obligation be delivered by A. to C. for the use of B., it is the deed of A. immediately; but B. may refuse, and thereby the bond will lose its force: *Dyer*, 49 a;¹ 3 Co. 26 b, cited 1 Salk. 301. And yet it seems the obligor can not plead *non est factum* (*Tawe's case*,² *Dyer*, 167 b; *Butler v. Baker*, 3 Co. 26 b), which clearly shows that the bond was his deed and only avoided by the refusal. So if a deed of gift of goods and chattels be delivered to the use of the donee, the goods and chattels are in him presently, without notice or agreement;

1. *Lytle v. Penny*.

2. *Taw v. Bury*.

but the donee may make refusal *in pais*, and by that the property and interest will be divested: 3 Co. 26 b.

These principles, we see, are drawn from the very fountains of the law. They have been recently recognized and very fully stated in a case in the king's bench, which goes the whole length on this subject: *Doe ex dem. Garbons v. Knight*, 5 Barn. & Cress. 671; 12 Eng. Com. L. 351. There it was decided that where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, it is a valid and effectual deed, though he keeps it in his own possession, there being nothing in the transaction, except the act of retention, to show that the grantor did not intend it to operate immediately; and delivery to the party who is to take by the deed, or to any person for his use, is not essential. It is also decided in the same case, that delivery to a third person for the grantee's use makes the deed effectual from the instant of delivery, although such person be not the agent of the grantee.

These positions appear to me to be peculiarly applicable to deeds which have their effect from the statute of uses. For if the grantor seals, acknowledges, and delivers (though not to the grantee personally, or to his agent) a deed setting forth a bargain and sale for valuable consideration, that consideration instantly raises a use, and the statute as instantly executes the possession to that use, and vests the estate in the bargainee, with or without his assent; leaving to him, indeed, the capacity to avoid it at his pleasure by renouncing it, either by reason of the consideration being fictitious, or the duties it imposes onerous and full of danger, as in the case of a deed of trust. Such, too, I take to be the received and constant practice of the country. Thousands of deeds have been executed by debtors for security of their creditors, and have been carried into effect without being executed by the trustee. Innumerable deeds of conveyance in the form of indenture have been made, and are now on record in our courts, which have never been signed by the grantees, their acceptance being evinced only by taking possession, and other acts *in pais*.

There is no instance in which our courts have decided such deeds to be incomplete and ineffectual, for such a decision would shake every title in the commonwealth. Still less has it ever been deemed necessary that a deed of trust should be executed by the *cestui que trust*, in order to give validity to its provisions. The instant the legal title becomes vested in the trustee, a trust arises on behalf of those in whose favor it is declared, provided

there be a sufficient consideration to sustain it; and from that moment it is beyond the power of the grantor. He can not revoke it, nor can he even extinguish it by getting a reconveyance; for no act of the trustee can affect the rights of the *cestui que trust*. If indeed one *cestui que trust* renounces the trust, then it either inures solely to the benefit of the rest, or, if there be no others, it results to the grantor. But until the renunciation is made, or implied from circumstances to be made, the trust continues. It arises without any act on the part of the *cestui que trust*, and in many instances he knows nothing of it until a period remote from the date of its creation. Years indeed may intervene (as in the case of shifting and contingent limitations by way of trust) before it is ascertained who is to be the *cestui que trust*. Who is to execute the deed in such a case? What would become of trusts in behalf of foreign debtors, or infant wards, or *femes-covert*, or infants yet unborn, if trusts were revocable at any time before actual acceptance by the *cestui que trust*? They would be futile and nugatory. We must therefore hold that the execution of the deed by the *cestui que trust* is not necessary. We must hold that the deed is good and available on the instant of its execution, and that it can only be avoided by the dissent, express or implied, of the *cestui que trust*. In what manner that dissent may be declared, or how implied, it is not necessary here to say; though I presume nothing more would be requisite than simple evidence of the fact of disclaimer.

If we apply another test to this question, it would seem equally decisive. The trustee is invested with the legal title. That title is a barrier to the execution upon the judgment at law. The creditor can not sue out his *elegit* with effect: he is driven to equity for relief. He has then but an equity. But the creditor, for whose benefit the trust is created, has an equity also, and it is prior to that of the judgment creditor. He therefore has a preferable right to demand that the legal title shall be made available for his relief. For a court of equity would never permit the debtor to retract the declaration of trust in favor of his creditor, until it was renounced by the creditor himself; nor would it refuse to compel the execution of the trust in his favor, whenever he should choose to assert his rights. He must, therefore, have an equity; an equity arising out of and coeval with the deed, and therefore prior to the subsequently acquired judgment of his adversary.

The American authorities upon this subject are somewhat

variant, but the great majority of them concur in principles fatal to the pretensions of the appellant. Some hold, that where a deed is beneficial to the grantee, his assent will be presumed until the contrary appears: 2 Conn. 633;¹ *North v. Turner*, 9 Serg. & R. 244; *Gray v. Hill*, 10 Id. 436; *Smith v. The Bank of Washington*, 5 Id. 318; *Wilt v. Franklin*, 1 Binn. 502 [2 Am. Dec. 474]. Some declare that the subsequent assent of the grantee renders the deed good by relation: 7 Pet. 609;² 2 Gall. 557.³ And this would seem conformable with the doctrine as to an escrow, where the second delivery relates back to the first and avoids all mesne acts. It seems to have very generally prevailed in relation to assignments for the benefit of creditors, whose subsequent assent has been deemed sufficient to give effect to the deed *ab initio*: 9 Mass. 307;⁴ 13 Johns. 285;⁵ *Marbury v. Brooks*, 7 Wheat. 556; *Brooks v. Marbury*, 11 Id. 78; *Nicoll v. Mumford*, 4 Johns. Ch. 529.

The learned counsel however has cited some cases from the decisions in Westminster hall, which seem *contra*, and must therefore be examined. The first of them, and that which has served as the authority for the others, is that of *Wallwyn v. Coutts*, which is briefly stated in 3 Meriv. 707, and is to be found fully reported in 3 Sim. 14; 5 Cond. Eng. Ch. 7. In that case the Duke of Marlborough conveyed his estates to trustees, for the purpose of paying off the debts of his son, the Marquis of Blandford, and certain annuities granted by the son, but no debts of his own. The annuitants were no parties to the deed; and the duke and his son afterwards joined in executing other deeds varying the former trusts. The motion was on the part of the annuitants, for an injunction to the proceeding under the subsequent deeds. It was refused; but the reasons of the court are not given. Certain it is that much difficulty exists in reconciling this case with those of *Ellison v. Ellison*, 6 Ves. 656, and *Pulvertoft v. Pulvertoft*, 18 Id. 84. In the first of these cases Lord Chancellor Eldon said that even if the parties had been pure volunteers, and not a wife and children, they might have filed their bill on the ground of their interest in the instrument in question, making the trustees and the grantor parties. He took the distinction to be, "that if you want the assistance of the court to constitute you a *cestui que trust*, and the instrument is voluntary, you shall have no aid; as upon a covenant to transfer stock, if it rests in covenant, and is purely

1. *De Forest v. Bacon*.

2. *Brashear v. West*.

3. *Brown v. Mindum*.

4. *Hatch v. Hatch*; S. C., 6 Am. Dec. 67.

5. *Ruggles v. Lawson*; S. C., 7 Am. Dec. 335.

voluntary, the court will not execute that voluntary covenant: but if the party has completely transferred the stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by the court. The actual transfer constitutes the relation between trustee and *cestui que trust*, though voluntary and without good or meritorious consideration; and the court would execute it against the trustee and author of the trust."

The case of *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 98, proceeds upon a *concessum* of the same principles. Now I can not perceive how the case of *Wallwyn v. Coutts* can be reconciled with these cases: for in that case there was a trust created which, upon the principle of the other cases, could not be retracted or defeated, except by a sale to a purchaser for valuable consideration; which, according to the English decisions, avoids a previous voluntary conveyance. In *Garrard v. Lord Lauderdale*, indeed (3 Sim. 1; 5 Cond. Eng. Ch. 1), the vice-chancellor attempts to reconcile them, but to my mind not satisfactorily. We shall presently see in what manner he does it. At present it may be remarked that the order in *Wallwyn v. Coutts* seems to have been made without having been much considered, or the reasons of Lord Eldon would have appeared in the report of the case. Whether he reviewed the cases of *Ellison v. Ellison* and *Pulvertoft v. Pulvertoft*, does not appear.

This case of *Wallwyn v. Coutts*, however, is the foundation on which the other cases rest. The first of them is *Garrard v. Lord Lauderdale*, 3 Sim. 1. There it was decided, upon the authority of *Wallwyn v. Coutts*, that a conveyance by a debtor to trustees for payment of scheduled creditors, who do not execute the deed, or conform to its terms, can not be enforced by the creditors. Now *Wallwyn v. Coutts* decides no such principle. The grantor in that case (the duke of Marlborough) did not make the conveyance for the payment of his own debts, but to pay the debts of his son. It was therefore strictly a voluntary conveyance on his part, in behalf of his son and his son's creditors, from whom no consideration moved to him. Admitting therefore his power to revoke that voluntary conveyance, shall it be inferred that he would have had the power of revocation, if the deed had been in favor of his own creditors, for the payment of his own debts, and therefore founded on a most meritorious and valuable consideration? It would seem not; for on the first supposition he was only resuming what he had imperfectly given; whereas, on the second, he was attempting to

resume what he had in fact paid away to *bona fide* creditors. The decision of Lord Eldon does not therefore, in this view, justify that of Vice-Chancellor Shadwell. But the vice-chancellor seems to think that the marquis of Blandford was, in the second deed, dealing with his own property, and had a right to pay his own creditors as he thought proper. This appears to me, first, to be a mistake of the fact; for the trustees, after paying the debts, were to stand seised to the use of the father for life, with only a remainder to the son in fee. But suppose the whole estate in him, subject to the trusts; what power could he have over trusts created, not by himself, but by another, and not out of his own property, but the property of that other? Taking as he did under that deed, he must have taken subject to its provisions, and to the trusts which it declared. He could have no right to revoke those trusts, whatever might be the rights of his father. Revocation can never be predicated of one who did not himself make the grant. Lord Eldon, then, could have proceeded on no such solecism, but must have acted on the supposed power of revocation in the father, because the trust being voluntary he might vary it as he pleased. This, however inconsistent with *Ellison v. Ellison*, is at least intelligible; while, on the other hand, it is not comprehensible upon what principle the son could revoke a deed made by the father for the benefit of the son's creditors.

The next case is that of *Acton v. Woodgate*, 2 My. & K. 492; 8 Cond. Eng. Ch. 97, which was decided upon the authority of *Wallwyn v. Coutts* and *Garrard v. Lord Lauderdale*; and if they are overthrown, it is without any just foundation.

The case of *Page v. Broom*, 4 Russ. 6, is the last to be considered. It is stated in the abstract of the case, that where a debtor, by deed poll, directs (*inter alia*) the receiver of the rents of his estate to keep down the interest of a debt, the direction does not create a trust in favor of the creditor, if it be without consideration and without the privity of the creditor. Upon looking into the case, I can find nothing to justify this report of its principles. It is exceedingly complicated in its facts, and does not seem to me to be very clearly stated. From what appears, I should take it that the deed poll was not held inefficient at all. Nothing is said of its being without consideration or privity of the creditor; but because it was inferior to the lien of another creditor's mortgage, it was postponed to that lien. Admitting, however, that the case was decided according to the abstract, yet it can have no influence upon this case.

The estate being already in trustees, and the legal title out of the grantor, the deed poll may have been considered in the light of a power of attorney revocable at the will of the maker, or of an order upon a particular fund not passed into the hands of the drawee, and therefore not operating an equitable assignment of the fund. The deed appears to have been a mere direction to the trustees to apply the surplus to that particular debt. It did not pass the legal title, for that was already in the trustees. Nor did it pass an equitable interest, for there was no decisive evidence upon its face of its intending to do so. It was, at most, equivocal. It might have been designed either as matter of contract, in which case there would, upon the principles I have advanced, have been an irrevocable trust; or it might have been intended as a mere arrangement of the maker's funds, and of course subject to be changed at pleasure. Which was it? Its features strongly indicated the latter. For the instrument was a deed poll for the direction of the trustees, to which the creditor was not party or even privy, and in its form it was a mere direction to the receivers to pay surpluses towards the discharge of the particular debt, instead of being an authority to the creditor to demand them. Such an instrument may well have been regarded as no contract with the creditor, but a mere direction to the trustees. In this view of the subject, it is clear that the case of *Page v. Broom* does not decide our case, for here there was an express trust in behalf of the creditors.

Upon the whole, therefore, I am of opinion that the trust deed in this case (unless it was fraudulent in fact or in law) was valid; that it passed the legal title to the trustees, thereby intercepting the lien of the judgment; that the judgment lien thus became a mere equity, and that it was subsequent, and therefore inferior to the equity of the creditors which attached upon the execution of the deed. Let us next inquire whether there was anything fraudulent in the deed itself. I have already said, I can see no evidence of actual fraud in this case. Is there anything in the deed which renders it fraudulent in contemplation of law?

The first objection is to the preference of creditors; which has been already examined and overruled. Next, it is said that the deed was a fraud upon the creditors generally, because it demanded a general release of the whole debt of each creditor, upon payment of a part. On this subject a distinction has been made in the cases, between the conveyance of the whole, and the conveyance of part only of the debtor's property, upon con-

dition that the creditors should compound, and accept a part of their debts, and give a release for the residue. The former is considered admissible and valid; the latter as oppressive upon the creditors, and as fraudulent and pernicious in its tendencies: *Seaving v. Brinkerhoff*, 5 Johns. Ch. 332. The English cases are all founded upon the *concessium* of the principle that such compositions are lawful, where the party has conveyed the whole of his property, and there is no concealment or underhand agreement with particular creditors: *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 Id. 166. Such compositions are in the spirit of the bankrupt laws, and can not therefore be branded with the imputation of fraud. "Humanity and policy," says the chief justice of the United States, "plead so strongly in favor of leaving the product of his future labor to the debtor who has surrendered all his property, that in every commercial country known to us, except our own, the principle is established by law." (He means that the principle is established by statute law, and compulsory.) "This furnishes a very imposing argument against its being a fraud:" *Brashear v. West etc.*, 7 Pet. 615. It is difficult indeed to imagine on what principle the right of composition, by the assent of the creditors, can be contested, if the right of preference be conceded. He who gives up his all, and who, in doing so, has a right to pay one in exclusion of others, can not justly be charged with fraud, because he prefers those who humanely surrender all claim to his future labors. To set aside such preference as fraudulent, is to deny the right to prefer, which on all hands is conceded. Accordingly such agreements, if executed, are acknowledged to be valid and binding: *Heathcote v. Crookshanks*, 2 T. R. 24; *Lynn v. Bruce*, 2 H. Bl. 317.

But it is not less true, that if they are of only part of the debtor's property, the transaction is oppressive upon the creditors and fraudulent. A debtor is bound by duty to devote the whole of his property to the satisfaction of his creditors' demands: 7 Pet. 614. He can have no right, while he is full handed, to extort from them a release of part of their just claims. "Such release is not voluntary on their part, and it is without any other consideration, than the apprehension that by non-compliance they may lose their whole demands. It is induced by the necessity arising from the certainty of being postponed to all those creditors who accept the terms by giving a release. It is not, therefore, voluntary:" Id. 615. It is a contrivance on the debtor's part to protect and secure a part of his property

from his creditors, and is therefore distinctly in conflict with that statute which avoids every contract or conveyance of a debtor, contrived of purpose to hinder, delay, or defraud his just creditors. He may protect his person indeed by a fair composition, and a surrender of all his property, but he can not protect a part of that property by giving up another part. Such an attempt is fraudulent and void: 5 Johns. Ch. 332.

In this case, however, I think the deed essentially complies with the requirements of the law. The bill itself states that it conveyed the whole property of the debtor, and the character of the instrument confirms the statement. It is therefore unassailable on the ground just examined.

Next it is said that the deed is fraudulent because of the reservation, out of the trust fund, of the small sum of three hundred and fifty dollars, for the purpose of paying some "small debts of high honorary obligation, not then liquidated or ascertained." This reservation, for so laudable a purpose, out of the avails of a very large and valuable estate, can not, I think, be void in itself; but I feel assured that it can not render the deed void as to the creditors who are secured by it. So too with respect to the shares of those who should refuse the composition. It is provided in deed that the surplus, if any, after paying off those who accept the deed, shall be repaid to the grantor; but until all who accept are fully paid, he is to get nothing. In this respect the case differs, I think, from *Hyslop v. Clarke*, 14 Johns. 458, and *Austin v. Bell*, 20 Id. 442 [11 Am. Dec. 297]. For here the *pro rata* shares of those who come into the composition are to be increased, whereas in those cases it was otherwise. In the first, the refusal of any vacated the trust as to all; and in the last the shares or proportions of those refusing were to be paid to the grantor himself, and were not to go to increase the dividend of those who should come into the composition; and this is a material ground of the court's opinion: See page 448. Such also was the case of *Burd v. Smith*, 4 Dall. 76. But be this as it may, I can not agree that all the creditors are to lose the benefit of this security for the payment of their debts, because an improper provision, deemed fraudulent by construction of law, has been inserted in the deed. I am aware that a distinction has been taken and sustained in some cases, between a deed avoided by statute, and one which is only constructively fraudulent upon equitable principles: 14 Johns. 458; 20 Id. 442.

But I think there is another distinction. Where a deed is

made for the security of various creditors, whose claims are distinct and unmingled with each other, and where part are illegal and fraudulent, and another part are fair and untainted with fraud, the security shall not be avoided as to the latter, provided they have given no aid, in any way, to the concoction of the fraud. A deed of that character ought to be considered distributively, and while it is avoided in part, it should be effectuated as far as it is good. If it were otherwise, then a deed of trust to secure the payment of ninety-nine just debts would be avoided by the fact that the hundredth was for usury or gaming; for the statute has declared all gambling or usurious securities to be void. This can not be: and accordingly this court in the case of *Kemper v. Kemper etc.*, 3 Rand. 8, decided that where the transaction is of such a nature that the good consideration can be separated from the bad, the court will separate them, and consider the deed valid so far as it is entirely distinct from and unaffected by the illegal consideration. So in *Skipwith v. Strother etc.*, Id. 214, where part of a bond was for gaming: and so in *Fleetwood v. Jansen*, 2 Atk. 467, there cited, a mortgage, in part for money lost at play, was avoided as to that, but held as a security for what was justly due. I am aware indeed that in *Garland v. Rives* the deed was avoided *in toto*; but there a gross fraud was committed upon the creditor, and the case affords no precedent for the case at bar. But even in that case Judge Green admits that a deed may be good as to part of the grantees, and void as to others: 4 Rand. 309 [15 Am. Dec. 756]. As where a deed is made to secure a just debt, and the equity of redemption is reserved to a stranger or to the family of the debtor; such a deed would be valid as to the creditor, but void, in respect to other creditors, as to the reservation of the equity of redemption: Id. So here, the deed is truly of no effect as to other creditors in so far as the surplus goes, but it is valid and available as a security to the creditors specified, and those assenting to the composition.

Next it is said that the creditors are delayed by this deed. This objection admits of a like answer with the last. But it may be added that a like objection was made and overruled in the case in the supreme court of the United States, already cited: 7 Pet. 615. It was carefully considered by the court, who felt its force. But the chief justice observed that "the property is not entirely locked up. A court of equity will compel the execution of the trust, and decree what may remain to

those creditors who have not acceded to the deed." He then proceeds to examine the Pennsylvania decisions upon the point, and though he obviously felt a difficulty, yet he followed them in affirming the validity of the deed. I am not aware of any material difference between the law of Pennsylvania and that of Virginia on this subject, and I therefore incline to think the cases are entitled to some respect. But I acknowledge that, independent of them, I can not believe that a mortgage or deed of trust is void because the mortgagor or debtor, after providing for the payment of the debt, declares the residue to be for his own use. Such is the ordinary course of all transactions of that kind, and to impeach them would be to avoid every mortgage or security given by an embarrassed debtor.

I have now waded through all the questions in the case save one; and in that only do I find error. I think it very clear that the appellant had a right to an account of the trust fund, and to the payment of his debt out of the surplus, if any, after satisfying the scheduled creditors and those who acceded to the composition. I am of opinion, therefore, to reverse the decree, and send the cause back for an account and further proceedings.

Decree reversed, and cause remanded for further proceedings.

BROOKE, J., absent.

PREFERENCE IN A DEED OF ASSIGNMENT given to one class of creditors over another will not invalidate the deed: *Niolon v. Douglas*, 30 Am. Dec. 368; *Crumford v. Taylor*, 26 Id. 379 and note 584, where the subject is treated at length.

PROVISION IN DEED OF ASSIGNMENT EXACTING RELEASE as condition precedent to enjoying the benefits conferred by the deed, is valid: *Niolon v. Douglas*, 30 Am. Dec. 368. A different result was reached in *Atkinson v. Jordan*, 24 Id. 281, in the note to which case the prior decisions in this series are collected. See also note to *Borden v. Sumner*, 16 Id. 340.

ASSIGNMENT FOR BENEFIT OF SUCH CREDITORS AS MAY ASSENT TO ITS TERMS is invalid as against a dissenting creditor, in so far as respects the surplus fund not required for the payment of the debts of the assenting creditors: *Borden v. Sumner*, 16 Am. Dec. 340.

ACCEPTANCE OF A DEED WILL BE PRESUMED in favor of the grantee, where the deed is absolute in form, and beneficial to him: *Church v. Gilman*, 30 Am. Dec. 82.

TRUSTEE HOLDING TITLE TO PROPERTY ASSIGNED FOR BENEFIT OF CREDITORS may not destroy the trust after he has once accepted it, by a renunciation thereof and a reconveyance to the grantor, though at the time that he thus attempts its destruction, the *cestuis que trust* of the deed have by no positive act evidenced their acceptance: *Scull v. Reeves*, 29 Am. Dec. 694.

KINNAIRD v. WILLIAMS.

[8 LEIGH, 400.]

LEGATEE CLAIMING UNDER WILL THAT DEVISES AWAY PROPERTY OF WHICH HE IS OWNER can have the benefit of his legacy, only upon renouncing in favor of the devisee his right to the property devised.

DEVISEE WHOSE CLAIM IS DEFEATED BY THE ASSERTION BY A LEGATEE of title paramount to the will, is entitled to the legacy of such legatee.

RENUNCIATION OF A HUSBAND'S WILL BY THE WIDOW, to entitle her to claim as in case of intestacy, must be in strict compliance with the terms of the statute, and is not therefore sufficiently expressed by the institution of a suit claiming title to property devised, by title paramount to the will.

BILL in equity. Isaac Williams, by his last will and testament, bequeathed to his wife certain personal estate, and also a life interest in all of his real estate. Within a year from Mr. Williams' death, his widow instituted a suit in chancery against the persons interested under the provisions of the will, in the real estate devised, after the determination of her life estate, in which she asserted her absolute right to such real estate by title paramount to the will. This claim she ultimately established. Upon the death of Mrs. Williams, the present plaintiff, claiming as her executor, filed this bill, to which the administrator of Hezekiah Bukey, the sole executor of Mr. Williams, was party defendant, setting forth the above facts, and that thereby it appeared that Mrs. Williams had renounced her husband's will, and was therefore entitled to the share in her husband's estate to which she would have had right, had he died intestate, or if not, that then she was entitled as legatee to the personal property bequeathed her by the will. The plaintiff prayed an accounting, and the payment to him of the personal estate to which Mrs. Williams was entitled as above. Defendant answered, denying plaintiff's right upon the facts stated. The judgment pronounced below was as follows:

“ This case is understood as follows. (Here the judge made a statement of the case, and recited the provisions of the testator's will.) This disposition of an estate over which the testator evidently regarded himself as having an entire control, carries on the face of it the leading objects of his mind; which were, 1. An ample provision for his widow for life, who was advanced in years and left childless; 2. The use of the land, after her death, by the husband of his deceased daughter (who had left no issue) during his life; 3. A provision for some of the branches of his own family. These intentions, so far as relates to the intended

bounty to Henderson, had he survived the widow, and to the other devisees in remainder, have been defeated by the title of Mrs. Williams to the land, paramount the will: and can she, under such circumstances, take the land and defeat the provisions of the will in relation thereto, and yet be entitled to the personalty devised to her, or the legal portion thereof secured to her in a case of intestacy?

In *Stewart v. Henry*, Vern. & S. 53, the rule is stated in clear terms, that where a devisee takes a gift under the will, the law annexes a condition to the gift, that he shall not dispute any other part of the will, even though another part gives away from him something to which he had an undoubted right. To this rule there are some exceptions, but none of them apply to this case. As a corollary from this proposition, I presume it follows: that if the devisee insists upon his paramount right, he surrenders the devise in his favor. In *Wilson v. Mount*, 3 Ves. 191, it was decided that a person entitled under a will, and also paramount and against it, must elect. In *Vane v. Lord Dungannon*, 2 Sch. & Lef. 130, the court held that where a will proceeds upon a mistake, a devisee, insisting upon the benefit of such mistake, must relinquish what the will gives him. In *Moore v. Butler*, Id. 267, it is said: 1. That no person puts himself in a capacity to take under an instrument, without performing the conditions of it, expressed or implied; and 2. That the foundation of the rule of election is, that a person can not accept and reject the same instrument: and that this rule is equally applicable to every species of instrument, whether deed or will. The same doctrine will be found in various cases, and among others in *Thellusson v. Woodford*, 13 Ves. 209; *Dashwood v. Peyton*, 18 Id. 41; *Welby v. Welby*, 2 Ves. & B. 187; *Gretton v. Haward*, 1 Swanst. 409.

In *Cogdell's Executor v. His Widow etc.*, 3 Desau. 388, it was decided, in South Carolina, that where a testator has a right to dispose of some property, and no right to dispose of some other property, which is vested in others beyond his control, and makes disposition by his will of both, those entitled to the property which testator had no right to dispose of shall not take any benefit under the will, unless they acquiesce in the disposition made by the testator in relation to their property. In *Upshaw v. Upshaw et al.*, 2 Hen. & M. 381 [3 Am. Dec. 632], our court of appeals recognize and affirm the whole of the doctrine here discussed. Judge Roane states the settled doctrine to be, "that no man shall disappoint the will under which he

claims, and that, therefore, if a man bequeath to another property to which he has no title, but which belongs to a third person, to whom he gives, by the same will, other parts of his estate, such third person must elect, and convey his property to the devisee, or he can not take the property devised to him." And his reasoning upon this point is, to my mind, conclusive of the first question.

Rebecca Williams, by her recovery, has converted the estate for life, devised to her, into an estate of inheritance. She has thereby defeated the intentions of the testator to provide for the collateral branches of his family, and invested the present plaintiff, who was not within the bounty of the testator, with a fee-simple estate in the land. In the language of Judge Roane, she has disappointed the will of the testator, and can not, therefore, be permitted to assert a right under the devises in her favor; nor can the present plaintiff be in a more favorable situation. I hold it unnecessary to enter into a process of reasoning to show that the recovery of the land, and the devising of it in a different channel from that intended by the testator, was not only an election, but an actual taking in contravention of the will. Indeed, in the first bill filed, the plaintiff charges the recovery of the land as constituting a renunciation of the will and of the devises under it, and claims in right of his testatrix such portion of the personal estate as Mrs. Williams would have been entitled to, if her husband had died intestate.

Without entering into the inquiry as to what were the rights of the wife at common law, so fully discussed in *Lightfoot's Ex'rs etc. v. Colgin et ux.*, 5 Munf. 42, we may safely adopt the conclusion that in Virginia a widow, where no settlement has been made, can only acquire an interest in the personal estate of her deceased husband, by virtue of some devise in his will, if he makes one; by renouncing the will as provided by the act of 1785, now constituting the twenty-sixth section of the one hundred and fourth chapter in the revisal of 1819; or under the twenty-ninth section of the same chapter, where the husband dies intestate. If the views hereinbefore taken are correct, Mrs. Williams could not take any benefit from the devises of the personal estate in her favor. She can not take as distributee under the twenty-ninth section, because, as to Isaac Williams' estate, there was not an intestacy. His will is before us, and excludes her from the moiety of the personal estate given by that section to widows whose husbands die intestate as to goods and chattels, or any part thereof, if there be no

child. It yet remains to ascertain whether her election to take the land in her own right operates so as to let her in as a distributee under the twenty-sixth section.

In *Taylor and Wife v. Brown et al.*, 2 Leigh, 419, the court decide that the renunciation of the will is an immaterial circumstance, with reference to the right of the wife to take by election against the will; and that taking out letters of administration with the will annexed did not amount to an election to take under the will. In that case the question was, whether Mrs. Taylor's election to take under the deed, and against the will, could be made in any other form than that of a renunciation, in the manner and time prescribed by the act of assembly. The chancellor held that it could not, and decided against her. The court of appeals was of opinion that this statute had no relation to a case of election to take by title paramount to the will, or under the provisions of the will, and reversed the decree. Taylor and wife offered to account for all the property not conveyed by the deed to Mrs. Taylor; and consequently the question, what interest she took as distributee, or whether she could take anything in that character, did not arise in the cause, nor was any opinion expressed on that point.

The power of disposing of personal property by will, to the exclusion of the wife, is only restrained by the act of assembly authorizing her to renounce the provisions of the will, in the manner therein provided, and giving her, as a consequence thereof, a share in the distribution. This Mrs. Williams did not do.

I am of opinion therefore: 1. That by recovering the land in fee, and thereby defeating the intentions of the testator, Mrs. Williams was precluded from claiming as legatee; and, 2. That failing to renounce the provisions of the will in her favor, in the manner and within the time prescribed by the statute, she did not entitle herself to claim as distributee of the personal estate, if such renunciation would, after the election which she made, have conferred such right: and consequently her devisee and personal representative, the present plaintiff, is not entitled to recover on either of those grounds.

The circuit court accordingly dismissed the bill with costs; and the plaintiff appealed to this court from the decree.

Fisher, for the appellant.

Summers, contra.

CARR, J. I am for affirming this decree; and I take pleasure

in declaring that the opinion of the judge in the court below has placed the subject in a light so strong and clear, as to render it hardly necessary to say a word. The widow could not claim under the twenty-ninth section of our statute of wills, as in a case of intestacy, because we have before us the will of her husband. She could not claim under the twenty-sixth section, as renouncing the will, because such renunciation must be made within twelve months after the husband's death, before the general court, or court having jurisdiction of the probate of the will, or by deed executed in the presence of two or more credible witnesses; and she has done neither of these things. She must then, by the express words which close the twenty-sixth section, be held to take under the will. But she has precluded herself from doing this, by her election to claim against the will: for she has sued for and recovered, in fee, by title paramount the will, the tract of land which the testator, considering it his own, had devised to her for life, and to others after her. By this step she has disappointed and defeated the whole scheme of the will: and the doctrine of election, that you can not claim under a will, deed, or other instrument, and against the same instrument, is too well settled to need that I should quote cases in support of it.

I am for affirming the decree, and can not but express some surprise that the appeal should ever have been granted.

TUCKER, P. The authorities cited by the judge of the circuit court who rendered this decree, establish beyond question the position that the decedent, Rebecca Williams, by asserting her individual right to the real estate devised away by her husband's will, and thus disappointing that will, forfeited all her rights under it. No principle has been more incontrovertibly settled than this, that where a devisee under a will sets up a claim to property devised by the same will to another, he must either release his right to that, or be excluded from the devise to himself: *Upshaw v. Upshaw et al.*, 2 Hen. & M. 381; *Wilson v. Lord Townshend*, 2 Ves. jun. 697. In this latter case, Lord Rosslyn says: "You can not act, you can not come forth to a court of justice, claiming in repugnant rights. When you claim under a deed, you must claim under the whole deed together. You can not take one clause, and desire the court to shut their eyes against the rest. Suppose in a will, a legacy is given to you by one clause; by another, an estate of which you are in possession is given to another: while you hold that, you shall not claim the legacy. You can not dispute the own-

ership. So in the case of personal legacies. If a specific thing belonging to one of the legatees is by the will given to another, the legatee can not hold both. He must make himself competent to take the legacy, by giving up the specific thing." In this case, Mrs. Williams has actually sued for and recovered the land, and has thus entirely disappointed the will. She must therefore give up all claims under the will.

I do not mean to deny that there may be cases in which the interest given by the will, will not be considered as altogether forfeited, but only *quousque* (as the phrase is); that is, the subject devised will be sequestered until satisfaction is fully made to the disappointed object of the testator's bounty: *Green v. Green*, 19 Ves. 669; S. C., 2 Meriv. 95. As, if the legacy was of ten thousand dollars, and the property claimed was only a single slave; though the legatee asserted his title to the slave, he would still have a right to the excess above his value. So here, had the plaintiff rested this case upon the allegation that the legacy was worth more than the land recovered, he would have had a right to the excess. But this is not pretended, nor is it probable; and the modification of the general principle, therefore, can not properly be applied to this case.

We come next to inquire whether the widow has entitled herself to demand her distributable share of the estate, either upon the ground of a supposed intestacy as to part, or upon the ground of a supposed renunciation of the will as to the whole. As to the first, there is no pretense for saying there is an intestacy as to that portion which she has forfeited by claiming the land. For it is actually devised to her, and is construed to go to those whom she has disappointed by her claim, in part satisfaction for their loss. As to the second. By the act 1 Rev. Code, c. 104, sec. 26, it is provided that the renunciation shall be made within one year: and this with a view to enable the executor, and all parties concerned, to know within a convenient time what course the widow may choose to take, and what disposition is to be made as to other distributees, legatees, etc. If the renunciation were indefinitely postponed, specific legatees and others must in like manner be held in suspense for indefinite periods, which would be greatly vexatious. The time therefore was fixed to a single year, which affords to the widow ample leisure for reflection, while it determines her choice early enough to avoid any material injury to others interested in the estate.

Again, observe how the renunciation is to be made, and be-

fore what tribunal. It is to be made before the general court, or the court of probate, or by deed executed in the presence of two witnesses; and the act must be no equivocal act, which may be avowed or disavowed, insisted on or explained away, according to subsequent events, but the widow must distinctly declare that she will not take or accept the provision made for her by the will, or any part thereof, and that she renounces all benefit which she might claim by the will. Lastly, observe the negative words, "every widow not making the declaration within the time aforesaid, shall have no more of her husband's slaves and personal estate than is given her by his will."

Now in this case it is contended that the suit was a renunciation. Was it the distinct, unequivocal act required by law? There is not a word or remote allusion to renunciation in it; and in the present bill we find the party actually renouncing the idea of renunciation, and claiming to hold as legatee under the will. The act of suing and recovering, then, does not bring the party within the provisions of the statute. It is neither a renunciation in itself, nor in the manner and form required by law. If a renunciation by parol or even by deed with one witness, or before any court other than the court of probate or the general court, would be void, how much clearer is the case of a mere bill in chancery, filed without a word of renunciation, and exhibited before a court not authorized by law to receive the renunciation. Had the widow solemnly appeared before that court, and renounced in the form required, she would not have been bound by it, and could therefore take no advantage of it. *A fortiori* she was not bound by, and could have no advantage of, that suit as a renunciation.

Then, as to the time. The suit, it is true, was brought within the year; but the decree was not rendered in her favor until several years after. Had it been decided against her, there can be no doubt that she would have asserted her claim under the will, and denied all renunciation. The suit, then, at most, could not have had that effect until the decree in her favor. But that decree was pronounced nearly four years after the testator's death, and so was not within the time required by law.

On the whole I am of opinion to affirm the decree.

BROCKENBROUGH, J. I concur entirely in the opinion of the president.

Decree affirmed.

BROOKE and CABELL, JJ., absent.

ELECTION.—The cases in which the doctrine of election is most often invoked, are those in which it is claimed that a legacy to the wife is in lieu of her dower. The courts do not favor a construction of the will that shall hold the wife to an election, but rather one that will give her both the dower and the legacy: *Adsit v. Adsit*, 7 Am. Dec. 539; *Theall v. Theall*, 26 Id. 501 and note; *Gordon v. Stevens*, 27 Id. 445. But if the intention clearly appear that she should exercise a choice, she must either renounce the legacy or dower: *Hamilton v. Buckwelder*, 1 Id. 350; *Van Orden v. Van Orden*, 6 Id. 314; *Theall v. Theall*, 26 Id. 501 and note. The principle is clearly analogous to that of the principal case, that a testator may affix the conditions that he pleases to the enjoyment of his bounty.

YEAGER v. CARPENTER ET AL.

[8 LEIGH, 454.]

PROCESS OF A COURT OF COMPETENT JURISDICTION IS SUFFICIENT PROTECTION for the acts of its officers done in pursuance thereof, however irregular and erroneous may have been the proceeding in which it issued.

TRESPASS. The opinion of Tucker, P., states the case.

P. Harrison, for the plaintiff.

G. H. Lee, contra.

CARR, J. I have always held it among the oldest and best settled principles of law, that a sheriff or other officer, executing the process or carrying into effect the orders of a court, was protected from all consequences, however irregular and erroneous was the proceeding; provided only that the court had jurisdiction of the matter. And this principle I have considered absolutely necessary for the furtherance of justice, and the order and well-being of society. In the *Case of the Marshalsea*, 10 Rep. 76 a, Lord Coke says: "A difference was taken when a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, there the party who sues, or the officer or minister of the court, who executes the precept or process of the court, no action lies against them. But when the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie," etc. Under this authority, I hold the third plea of the defendants a good defense, and the replication naught; and am for affirming the judgment.

TUCKER, P. The first question in this case is whether the third plea of the defendants is good in substance. The action is trespass against the overseer of the road for opening a road through the plaintiff's land. The overseer pleads that he, the defendant, was, by the county court of Randolph,

in which county the land lies, ordered, as the surveyor of the highway from the Lewis county line to the mouth of the lane opposite where Eve Yeager formerly lived, to open that part of the road from the mouth of the lane to Jacob Teeter's, to intersect the road where it formerly did; and that in the execution of the said order, he necessarily committed the several supposed trespasses in the declaration mentioned, under the authority of and in obedience to the order of the said court, as he lawfully might. This plea appears to me to be good. The county courts are invested with jurisdiction over the roads of their respective counties, and having that jurisdiction, their officer or minister (the overseer) must obey their order, and is not entitled to question either the judiciousness or the regularity of the exercise of their power. The numerous authorities referred to by the counsel for the defendants in error prove this. A part of them may be mentioned here: 6 Rep. 54 a;¹ Doug. 671;² 2 Bl. 1195;³ 6 T. R. 245.

The cases cited on the part of the plaintiff in error appear to me inapplicable. In the case of *Davison et al. v. Gill*, 1 East, 64, A. sued B. for trespass. B. pleaded a justification under a footway immemorially used as a public road. The road, however, had been stopped up by an order of the magistrates acting under a statute, the forms of which had not been strictly pursued. The court decided that the order was bad and the defendant justified. It is not perceived how this decision can bear on the case at bar. If Yeager had put a fence across the road, and been prosecuted for doing so, and if, to a plea that it was his close, there had been a replication of this order, the case would apply; and in such a case, I should hold that, as he had been no party to the proceeding, he might well contest it, if it was altogether irregular. The case of *Martin v. Marshall*, Hob. 63, decides that a party pleading a prescription must bring himself strictly within the prescription pleaded. I can perceive no analogy between this case and the case at bar, and can therefore enter into no comparison between them. The other cases cited are not in our library.

In cases of this kind, indeed, where an illegal order is made, which is injurious to one who is no party to the record, and who can not, therefore, sue out a *supersedeas* or writ of error, or obtain an appeal, the question presents itself, how is the injured party to be redressed, if he can not sue the officer? I answer, 1. That he may stop up the road, and if prosecuted,

1. *Countess of Rulland's case*.2. *Tarlton v. Fisher*.3. *Cameron v. Lightfoot*.

may defend himself by showing that the order is inofficious and does not bind him; 2. The case already cited from 1 East shows that he may sue in trespass any person who passes along the new road, and the irregular order will be no justification to such person; 3. If the order is made at the instance of any person, that party is responsible (though the officer is not) for procuring an order to violate his rights, without making him a party; and, 4. If there be no party, then there is no *lis*, and the order is certainly not the judgment of the court, but a mere police order (as in this case) which may be set aside upon motion at a subsequent term. And this court decided, in two cases from Campbell (not yet reported), of *Hollins v. Patterson*,¹ and *Crenshaw v. Same*,¹ that even in a case where the order was made on the motion of a party, such order, if irregular, might be set aside at a subsequent term on motion. And if the motion to rescind were refused, the party might doubtless have his redress; whether by *supersedeas* or *mandamus*, it might be premature to say.

The plea, then, I hold to be good. If so, the replication is bad; for it certainly offers no answer to the plea. It alleges that the *locus in quo* was not a public road or highway, at the time when, etc. But admit it to be true that it had not before been a public highway, yet here was an order of court commanding the overseer to open it as such, which order he was bound to obey. I am therefore of opinion that the judgment should be affirmed.

CABELL and BROCKENBROUGH, JJ., concurred. Judgment affirmed.

BROOKE, J., absent.

JUSTIFICATION OF OFFICER BY PROCESS.—Process of a magistrate or officer of limited jurisdiction must show on its face that he had jurisdiction of the subject-matter, and must not show any want of jurisdiction over the person or the process, or it will be void, and no justification for the officer who executes it: *Hall v. Howd*, 27 Am. Dec. 696. But where process of a court of competent jurisdiction is voidable only, it is a justification to the officer who acts under it prior to its being set aside: *Chapman v. Dyett*, 25 Id. 596. For an extended discussion of the subject, see the note to *Savacool v. Boughton*, 21 Id. 181.

1. 6 Leigh, 467.

JAMES v. BIRD'S ADM'R.

[8 LEIGH, 510.]

RESCISSION WILL NOT BE DECREED in favor of the grantor of a conveyance executed by him to defraud his creditors.

FRAUDULENT GRANTOR WILL NOT BE AIDED in recovering the unpaid part of the purchase price of the property conveyed.

VENDOR OF PERSONAL PROPERTY has no equitable lien thereon to secure the payment of the purchase money, even while the property remains in the vendee's hands.

BILL in equity, seeking the rescission of a conveyance of slaves, executed by Bird to James. At the time of the conveyance, Bird took James' bond for eight thousand dollars as the consideration for the transfer. The conveyance was fraudulent. James, the defendant below, appealed from the decree. The opinion states the other facts of the case.

Reynolds, for the appellant.

PARKER, J. I am of opinion that the decree of the chancellor in this case is erroneous in directing a sale of the slaves conveyed by Bird to James, and the payment of the balance of the purchase money found due by the commissioner, instead of dismissing the bill.

It is proved beyond all doubt, that the contracts sought to be rescinded were executed by Bird to hinder and delay, if not entirely to defraud his creditors. In a bill previously filed by him against James and others, and sworn to, but afterwards dismissed for the evident purpose of getting rid of his admissions, he states that being somewhat embarrassed by debts, and confiding in the assurances of James that a sale of his negroes and other property to him, to be returned when his difficulties were over, would be the means of saving the property from being seized by his creditors, and sold to great disadvantage, he had entered into the arrangements which he now asks the court to set aside. Even in the bill since filed, a very flimsy veil is thrown over the transaction, and it is easy to see through it what was the real design of the parties, independent of the proofs, which are full and conclusive. In the words of the chancellor, I think it impossible for any one to read this record, without being satisfied "that there has been fraud in all these transactions between the plaintiff and James; that the plaintiff has fully participated in it; and that the whole of those sales were made by the plaintiff, in part at least, with the

view of hindering and delaying, though most probably not of wholly evading the payment of his just debts."

If this be so, what pretense has he for asking the aid of a court of equity (especially when he has a clear legal remedy) either to rescind the contract, or to decree him his purchase money? There is no case in equity where any relief has been given to a fraudulent grantor of property, the conveyance being made to protect it against his creditors, except that of *Austin's Adm'r v. Winston's Ex'r*, 1 Hen. & M. 33 [3 Am. Dec. 583], decided by a divided court, and perhaps, under the circumstances, properly decided. The relief given in that case, as Judge Green remarks in *Starke's Ex'rs v. Littlepage*, 4 Rand. 371, was founded upon the fact that the grantee, a creditor on a replevy bond, the debtor being in distressed circumstances, had availed himself of his power over him to induce the debtor to unite in the fraud, to avoid the impending danger. The majority of the court did not consider the debtor to have acted freely, and they found an apology for him in the distress and oppression of his circumstances, which neutralized and palliated his involuntary fraud, and rendered him either excusable or less guilty than the grantee. But in this case there are no circumstances of this kind in favor of the plaintiff. He was not in the power of James, nor pressed by impending dangers, but perfectly free to act as he pleased. He and James were *in pari delicto*, and neither of them entitled to come into equity; for there, he that has done iniquity shall not have equity; that is to say, he shall not have the aid of a court of equity when he is plaintiff, to any extent, but will be turned over to his legal remedy. So far is this principle carried in the case of *Starke's Ex'rs v. Littlepage*, that if James had sued at law to recover the slaves included in the deed of the eighth of July, 1814, Bird would not have been allowed to defeat the claim by proving the fraud; and so too if Bird brings his action to recover the purchase money, to which there seems to be no impediment, the fraudulent grantee would not be permitted to impeach the transaction, and could set up no other than a strictly legal defense.

The decree of the circuit superior court was also erroneous in giving to Bird a lien upon the slaves in the hands of James; for the vendor of personal property has no implied or equitable lien for the purchase money, but must look alone to the personal responsibility of the vendee, as this court decided in the case of *McNeil v. Bird's Adm'r*, in July, 1835, in accordance with its previous decisions.

There is another point in the case, which in my opinion would justify this court in reversing the decree and dismissing the bill, although it is perhaps not necessary to decide it. The prayer of the bill is to rescind the contract, to have the slaves restored, and for general relief. Under the latter prayer, the chancellor thought he might relieve to the extent of decreeing to the complainant the balance of his purchase money. But I much question whether the case made by the bill authorized such a decree. Under the general prayer, the plaintiff is entitled to any relief which the material facts and circumstances put in issue by the bill will sustain; but it must be consistent with the case made, and if inconsistent with it, and with the specific relief prayed, will always be refused: Coop. Eq. Pl. 14; Mitf. Pl. 38, 39, 3d Am. ed., and the cases there cited; *Hiern v. Mill*, 13 Ves. 119, and the case of *Soden v. Soden*, cited in that case; *Johnson v. Johnson*, 1 Munf. 549, and the authorities cited in the note. In this case the sale of the slaves and other property is repudiated. The bond for eight thousand dollars is stated to have been given by James not as a consideration for the property conveyed, but to secure the vendor "against accidents," and that he "might have something to show." All the facts charged by the bill, and the specific prayer, are inconsistent with the idea of a sale, or with a right to purchase money; and therefore to decree the latter, without an alternative prayer, or statement of facts justifying it, seems to me to be opposed to the current of English authorities, and so far as the point has occurred, to our own. But as I am clear upon the first ground, it is, as I have already said, unnecessary to decide this question, and I wish to be considered as not deciding it.

The other judges concurring, decree reversed and bill dismissed.

CABELL and BROOKENBROUGH, JJ., absent.

FRAUDULENT CONVEYANCE IS BINDING UPON THE GRANTOR therein: *Stewart v. Iglehart*, 28 Am. Dec. 206 and note, where the prior decisions on this subject are collected.

VENDOR OF PERSONALTY HAS NO LEN FOR THE UNPAID PURCHASE MONEY after his delivery of possession to the vendee: *Jenkins v. Eichelberger*, 28 Am. Dec. 691, and note 694.

DOOLITTLE v. MALCOM.

[8 LEIGH, 608.]

AWARD, THE DECLARATION ON, need only state so much of the award as is necessary to show plaintiff's claim.

AWARD IS MUTUAL IF IT DIRECTS THE PAYMENT OF A SPECIFIC SUM by one party to another, without directing the latter to execute a release, or do any other act.

AWARD OF PAYMENT OF A SUM OF MONEY, written on the back of the arbitration bond, must be taken to settle all the matters therein submitted.

CONDUCT OF ARBITRATORS CAN NOT BE IMPEACHED by plea alleging that they made their award without hearing all the legal and pertinent evidence offered relative to the matter in dispute, or that they decided the matter upon their own personal knowledge concerning it.

COVENANT. An arbitration bond, executed by plaintiff and defendant, recited that a dispute existed between them, relative to a claim of plaintiff, that his mill on Mud river had been damaged by the erection at a point lower down the river, by defendant, of a mill-dam, whereby the water in the river was caused to flow back and drown plaintiff's mill; and that, desirous of settling this demand and quieting this claim, the parties had agreed to submit it to nine arbitrators named in the bond, a majority of whom were thereby empowered to determine whether in fact any damage had been done plaintiff, and, if so, to what amount. The parties then covenanted to abide by the award made. The arbitrators were to convene at such places and times as they might determine upon, reasonable notice thereof being given to the parties. A majority of the arbitrators named in the bond made and signed the following award, which was indorsed upon the arbitration bond: "We, the undersigned arbitrators, do agree that Ambrose L. Doolittle shall pay to Joseph Malcom the sum of two hundred dollars, within six months after date, September the twenty-sixth, 1831." The present action was upon defendant's covenant in the above bond. Plaintiff set out in the first count of his declaration, in the very words of the bond, that portion from which it appeared that a dispute existed between the parties, relative to the damage done by defendant's mill-dam to plaintiff's mill, and that the parties had resolved to submit the question to the determination of arbitrators, whether any damage had been in fact done, and if so, to what amount. The remainder of the bond it set out in substance. It then alleged the award, notice to the defendant thereof, etc. The second count set out no part of the bond verbatim. but merely gave its substance. The plaintiff took

oyer of the bond, and then demurred to each count of the declaration. The demurrers were overruled. Defendant then pleaded five different pleas. The second averred that no award had been in fact made. The fourth, that the arbitrators had made their award without hearing all of the proper and pertinent evidence relative to the matter offered by defendant. At a later period of the cause, defendant offered a sixth plea, which set forth that the arbitrators had not founded their award upon the evidence offered, but upon their own personal knowledge, or upon the knowledge of a part of their number. Plaintiff demurred to this plea, and his demurrer was sustained. Plaintiff afterwards obtained leave to demur to defendant's fourth plea. There were three trials of the case, the jury disagreeing in the two first; but on the third trial, the jury found for plaintiff, and assessed his damages at two hundred dollars. The other facts of the case appear in the opinion. On petition of defendant, a supersedeas to the judgment was granted.

B. H. Smith and Summers, for the plaintiff in error.

Reynolds, contra.

PARKER, J. There are several objections taken to this judgment. It appears to me that the counsel for the defendant in error, in his notes, has satisfactorily answered them all. The declaration was sufficient, and the demurrer to it properly overruled. In this action the plaintiff need only show so much of the award as is sufficient to state his demand: *McKinstry v. Solomons*, 2 Johns. 62.

An award of payment of a specific sum by one party to another is mutual and sufficient, without directing the latter to execute a release or do any other act: *Id.*; and same case affirmed in the court of errors: 13 Johns. 27. The award was written on the back of the arbitration bond, and must be taken to settle all matters therein submitted; and is therefore sufficiently certain and final.

The fourth and sixth pleas impeach the conduct of the arbitrators, and under the decision of the court in *Miller v. Kennedy*, 3 Rand. 2, ought to have been rejected. The case of *Mitchell v. Slaveley*, 16 East, 58, only decides that if all matters in difference are submitted, and there is a matter in difference of which the arbitrators are notified, and they do not act upon it, that matter may be pleaded in bar. The award there was not an award in pursuance of the submission. The conduct of the

arbitrators in making up their award was not impeached, but it was denied that they acted upon all the matters submitted.

The motion to exclude the writing on the back of the submission from going in evidence to the jury as an award, was properly overruled. In doing so, the court does not decide the issue made by the plea of no award, and the replication thereto. If there is any ambiguity upon this subject, it arose from the terms of the defendant's own motion. The other objections are not worth noticing.

The judgment must be affirmed.

TUCKER, P., and BROOKENBROUGH, J.. concurred. Judgment affirmed.

BROOKE and CABELL, JJ., absent.

AWARDS, WHEN SET ASIDE.—Error of judgment by the arbitrators, will not be cause sufficient to induce the court to set aside their award in a case free from the imputation of fraud or collusion: *Smith v. Cutler*, 25 Am. Dec. 580; *Alken v. Bolan*, 2 Id. 660. An award will, however, be set aside for error of fact or of law apparent upon its face: *Pleasants v. Ross*, 1 Id. 449; *Alken v. Bolan*, *supra*; *Hewitt v. State*, 14 Id. 259; *Jocelyn v. Donnel*, Id. 753 and note; *Bumpass v. Webb*, 29 Id. 274. Corruption and misbehavior in the arbitrators will also be cause for setting aside their award: *Jocelyn v. Donnel*, *supra*, and note; *Bumpass v. Webb*, *supra*.

TREMPER v. HEMPHILL.

[8 LEIGH, 623.]

RELEASE OF SURETIES WHO HAVE SIGNED AS JOINT OBLIGORS is not effected, at law, by anything short of what amounts to a release or discharge of all the parties to the bond. Thus, where a bond for the payment of money was without interest, a separate agreement by the principal, subsequently entered into under seal, that the amount of the bond should bear interest, does not avoid the liability of the sureties.

DEBT upon an obligation under seal of Robert Hemphill, Joseph Points, jun., and Walter H. Tapp, whereby they undertook to pay within nine months from date the sum of two hundred and fifty dollars, to Lawrence Tremper, his heirs or assigns. Below this obligation appeared an additional sealed obligation of Robert Hemphill, declaring that the above obligation was to bear interest from date. Both instruments bore the same date. Points and Tapp were sureties of Hemphill, and founded their defense upon the fact of the execution of the second writing obligatory, above described. Their plea was ob-

jected to, but was sustained by the court; and the court, upon the trial of the cause, instructed the jury that the execution of the said writing, if without the consent of the sureties, would exonerate them. The fact that Points and Tapp were sureties was admitted. Verdict and judgment went for defendants, whereupon plaintiff obtained a *supersedeas*.

Baldwin, for the plaintiff.

Michie, *contra*.

PARKER, J. The plea allowed in this case neither amounted to a payment of the bond, nor offered a legal excuse for not paying it. The supplemental paper was no release to the principal, and consequently at law was no release to the surety. It can not be pretended that the principal, by indorsing on the bond a promise to pay interest from the date, was discharged from his previous obligation. Then it was no discharge of the surety; for I conceive that, at law, nothing which does not discharge the principal can discharge the surety; unless it affects the obligation itself, by erasure or alteration in a material part, with the consent of the principal, but without the assent of the surety. And this was the ground of the decision of *Davey et al. v. Prendergrass*, 5 Barn: & Ald. 187; 7 Eng. Com. L. 62.

The case of *Miller v. Stewart*, 9 Wheat. 680, may be good law, but I conceive it does not apply here. There the recital in the condition of the bond stated a special appointment, and the sureties only bound themselves for the principal's discharging the duties of "the said appointment." The court thought the alteration in the instrument, by adding another township, was a new and different appointment, and so not covered by the condition of the obligation. As the alteration was in the appointment, and not in the bond, I presume, upon the reasoning of the court, they would have held the principal, as well as the surety, absolved from liability virtue by of that bond.

I am for reversing the judgment, and sending the cause back, with directions to disallow the plea, and to permit the defendants to plead anew.

BROCKENBROUGH, J. I am decidedly of opinion that the additional obligation executed by the defendant Robert Hemphill was no release of the obligation previously executed by the said Hemphill, Points, and Tapp, and that neither the principal obligor nor his sureties were thereby discharged from their said obligation. I am therefore for reversing the judgment. setting

aside the verdict, and remanding the cause for further proceedings.

TUCKER, P. I am of opinion that this judgment is erroneous. It was decided in *Davey etc. v. Prendergrass*, 5 Barn. & Ald. 187, that a parol agreement to give time to the principal in a bond, is no defense at law to an action on the bond against the surety: and this decision was understood to be approved by the whole court in *Steele v. Boyd*, 6 Leigh, 547 [29 Am. Dec. 218].

“The ground,” said Lord Chief Justice Abbott, “of my opinion is that general rule of the common law, which requires that the obligation created by an instrument under seal shall be discharged by an instrument of equal validity.” What amounts then to a discharge of a bond at law, is a good plea, but what falls short of operating a release or discharge of the whole bond, is not so. For the common law knows no distinction between principal and surety, in the action of debt on a bond; and hence a covenant not to sue the principal can not be pleaded by the surety as a release; for the principle is laid down without limitation, that a covenant not to sue one of two obligors is not to be pleaded as a release, by the other: 8 T. R. 168;¹ 6 Munf. 9.² A release indeed to one is a release to all, for it discharges the obligation; and whatever operates as a release must discharge all, in the case of a joint bond, for the judgment must be joint against all, or there must be judgment for all the defendants. The very judgment here is a proof of the fallacy of the principle of permitting the sureties to plead a separate release; for the effect is that the judgment is entered in favor of the principal also; and necessarily indeed, according to the common law, as a release to one is a release to all.

In this case it is not pretended that the supplemental paper is a release of the principal. It can not then, at law, release the surety. If it were a complete bond for the whole sum, it would not discharge the first bond, since one bond can not be pleaded in bar of another, even though to the last bond there are sureties: *Per Pratt*, C. J., in 1 Stra. 426,³ citing 2 Roll. Abr. 470; 1 Brownl. 47, 71; *McGuire v. Gadsby*, 3 Call, 237; *Heathcote v. Crookshanks*, 2 T. R. 28. Much less can this discharge the former, as it is nothing more than a promise to pay interest nine months earlier than the first bond required. Nor was it part of the former bond. It could not be that the bond of three obligors was altered by a second supple-

1. *Dean v. Newhall*.2. *Ward v. Johnson*.3. *Cumber v. Wane*.

mental instrument executed by one. If the bond itself had been altered, it would have been a forgery; and if, by this fiction of law, a separate bond written at the bottom of the first is part of the original bond, then this separate paper is a forgery. But can it be believed that this principle can be so applied, or that because the law construes an indorsement or subscription, made by the consent of the parties to an instrument, as part of the instrument—as part of the agreement of the parties—such a consent by one party shall make it part of the instrument as to all? Assuredly not. But admit it: and then this subscribed paper, being made part of the bond as to all by the assent of one, becomes the bond of the sureties as well as the principal, and so far from discharging them, binds them still further than they were bound before, unless it operates to avoid the bond altogether, because of the alteration, in which case the principal himself would be discharged. To such incongruities are we led by the adoption of a false principle of law. The case of *Miller v. Stewart*, 9 Wheat. 680, I think was badly decided. But it does not apply; for there the bond was considered as referring to an antecedent deed of appointment, and the alteration of that deed was held to avoid the bond as to the sureties.

I am of opinion to reverse the judgment, set aside the verdict, and send the cause back, with directions to award a repleader; the plea of the defendants having been improperly received, as it offered no good bar to the action.

Judgment reversed, and cause remanded.

BROOKE and CABELL, JJ., absent.

ACTS OF THE CREDITOR THAT WILL DISCHARGE THE SURETY.—The cases upon this subject reported in this series are collected in the note to *Steele v. Boyd*, 29 Am. Dec. 218.

C A S E S
IN THE
SUPREME COURT
OF
ALABAMA.

WYMAN v. CAMPBELL.

[6 PORTER, 219.]

FORMER STATUTE IS NOT REPEALED BY ENACTMENT OF LATER ONE on the same subject, when both may operate together.

JURISDICTION OF ORPHANS' COURT IN PROCEEDINGS FOR SALE OF REAL ESTATE of a decedent is derived exclusively from legislation, and its acts are, unless warranted by statute, *coram non judice*.

PROCEEDINGS OF ORPHANS' COURT RELATING TO SALES OF REALTY ARE IN REM against the decedent's estate, and not *in personam*; and the real estate itself becomes subject to the action of the court, for the purposes of a sale, as soon as it has obtained information of facts sufficient to give it jurisdiction.

ORPHANS' COURT ACQUIRES POTENTIAL JURISDICTION over the sale of a decedent's estate, by the death of the ancestor, and this jurisdiction becomes actual as soon as the court undertakes to act upon a report of commissioners, which shows that a division of the real estate can not be equitably made without injury to the heirs.

ORDERS OF ORPHANS' COURT ARE CONCLUSIVE, until reversed by a higher tribunal, unless they are founded in a usurpation of power; and such orders are not rendered void by the existence in the record of errors or irregularities which would authorize their reversal by a revising court.

OMISSION OF ADMINISTRATOR TO GIVE BOND on sale of real estate, as required by law, does not make the sale void.

AUTHORITY TO ADMINISTRATOR TO SELL HIS INTERSTATE'S ESTATE must be strictly pursued, and the formalities prescribed by the order of sale must be carefully observed.

PURCHASER CAN NOT BE PREJUDICED BY OMISSION OF ADMINISTRATOR to perform any act after the sale.

ERROR to the circuit court of Montgomery county. The action was trespass to try title. The plaintiffs were the heirs of Archibald Campbell, who died intestate. The defendants

pleaded *non culpabilis* and *liberum tenementum*, upon which issues were joined. There was a verdict and judgment for the plaintiffs, from which judgment there was a writ of error to this court. The bill of exceptions stated that on the trial, the defendants introduced the records of the county and orphans' courts of Montgomery county, showing that one John Harper was appointed administrator of the estate of said Archibald Campbell, deceased; that subsequently, one of the heirs, David Campbell, petitioned for his distributive share of the estate; that commissioners were appointed to divide the estate, who made a return showing that division of the estate could not be made by them; that said Harper filed said return, and obtained an order authorizing him to sell the real estate in question, which order required him to give a bond to comply with the law for the sale of real estate by administrators, and to make a return of the proceeds of the sale within three months; that said Harper sold the premises to one Goldthwaite, and executed to him an administrator's deed for the same. Goldthwaite afterwards conveyed to the defendants. There was no evidence that Harper had given bond to sell according to law. The other facts and the charges given to the jury, are sufficiently stated in the opinion.

Thorington, for the plaintiffs in error.

Goldthwaite and Campbell, contra.

COLLIER, C. J. Considering the case, in the point of view in which it was presented to the court at the argument, we proceed to inquire: 1. Does the statute of 1822, relating to the sale of the real estate of deceased persons, repeal previous enactments on the same subject, and to what extent? 2. Had the orphans' court jurisdiction of the subject-matter of the proceeding on which it acted? 3. If it had jurisdiction, were its proceedings void, or only voidable—and if the latter, could they be collaterally impeached?

1. In order to a solution of the first question, it is necessary to review the several statutes upon the subject to which it relates. By the twenty-eighth section of the act of 1803, "concerning wills, and the duty of executors, administrators, and guardians," it is enacted: "That when any executor or administrator shall discover or believe that the personal estate of his testator or intestate, is insufficient to pay the debts of the deceased, then it shall be the duty of such executor or administrator, as soon as may be, to make and exhibit on oath, a just and true account

of the said personal estate and debts, as far as he can discover the same, to the orphans' court," etc. Upon the exhibition of such account, it is directed, that a citation shall issue, requiring all persons interested in the lands, tenements, and hereditaments of the deceased, to appear, at a time not less than forty days thereafter, and show cause why so much of the lands, etc. as will be sufficient to pay the debts of the deceased, should not be sold. This citation is directed to be set up in three of the most public places of the county in which the lands, etc., are situate, for the space of thirty days, and be published, for the same period, in a public newspaper of the state.

By the second section of the act "concerning judicial proceedings," passed in 1818, it is enacted: "That whenever it shall be made to appear to the satisfaction of any county court, that the estate of any deceased person, or those who are entitled to inherit the same, will be less injured by a sale of the land or a part thereof, for the payment of debts, than by a sale of slaves, such court may, on the petition of any party interested, cause a citation to issue to all other interested persons, if in the county, or when that is not the case by publication of notice in some newspaper, requiring such interested party or parties to appear at the next county court, and show cause, if any they can, why sale of the land belonging to the estate so situated should not be ordered; and on the return of such citation made known, or proof of the publication of the notice hereby required, at the next term of said court, if no cause be shown, which the court deem sufficient, such court may order sale of such land, or part thereof, as may be necessary to satisfy debts, without a sale of negroes," etc.

The first section of the act of 1820, entitled "an act supplementary to the laws now in force concerning wills, intestates, and guardians," enacts that, whenever any person dies intestate, leaving an estate unincumbered by debts, so as to render unnecessary a sale of any part of it, the chief justice or presiding magistrate of the county court shall, within three months after the personal representative reports the same to be solvent, appoint five commissioners, with authority to them, or a majority of them, to make division or distribution of the estate, etc. "Provided always, that when such division or distribution can not be equitably effected, without manifest injury to the legatees or other legal representatives, then, and in that case, such estate shall be exposed to public sale as heretofore."

The act of 1822, entitled "an act to authorize administrators

to sell land belonging to the estate of their intestate, to which a complete title has not been obtained," makes it lawful for an administrator or an executor who has no power by the will to sell real estate, to pay debts, or to make a more equitable division among the heirs, devisees, etc., to file a petition in the county court of the county in which letters of administration or letters testamentary have been granted, setting forth that the personal estate of his intestate or testator is not sufficient to pay the debts with which it is chargeable, or that the real estate can not be fairly, equitably, and beneficially divided among the heirs or devisees of the intestate or testator, without a sale thereof, setting out and particularly describing in such petition the estate proposed to be sold, and the names of the heirs or devisees of such intestate or testator, and particularly stating which are of age and which are infants or *femes-covert*. The court is then directed to issue citations to the heirs, etc., of full age, and to the husbands of such as are *femes-covert*, and to appoint guardians to such as are infants. An issue is then to be made up between the petitioners and the guardians, etc., by the latter interposing a formal denial of the allegations of the petition. Proof is to be taken by deposition, and if the court shall determine in favor of a sale, commissioners are to be appointed to conduct it.

These were the only acts to be found in our statute book at the time the order was made for a sale of the lot in dispute, which relate to the sale of the real estate of intestates. And it may be remarked that neither of these enactments expressly repeals the other—so that we have only to inquire whether they so conflict in their terms, that they can not subsist together. To apply this test, we must first settle the interpretation of the act of 1822: to do this, we need not look beyond its terms for aids to lead the judgment, for it is so explicit in its provisions, as to speak conclusively its own meaning. It authorizes an executor or administrator to file a petition in the county court of the county whence they derived their authority to act, asking an order for the sale of the real estate of their testator or intestate: 1. Where the personal estate is insufficient to pay debts; 2. Where the real estate can not be fairly, equitably, and beneficially divided among the heirs or devisees thereof.

The act of 1822 embraces the entire ground covered by the act of 1803, and is still more extensive in its objects. It invests the personal representative with the right to petition the county court for an order to sell the real estate of his testator, or intestate, upon the personal estate being insufficient to pay

the debts with which it was chargeable. It varies materially the mode of procedure in order to obtain the decree for a sale, as well as the mode of its execution; and, the two acts being incompatible with each other, the earlier must be taken to have been abrogated by the later. The statute of 1818 gives the right to the county court, on the petition of any party interested, to order the lands belonging to the estate of a deceased person to be sold, whenever the estate or those entitled to inherit it, would be less injured thereby than by a sale of the slaves. There can be no pretense for saying the act of 1818 is in conflict with that of 1822. They each contemplate objects entirely different, and may operate together.

The proviso of the act of 1820 authorizes a sale of the land, when it can not be equitably divided without manifest injury to the legatees or heirs; and the impracticability of an equitable division is a fact to be ascertained after commissioners shall have been appointed to effect it. This statute confers an authority upon the county court, which the act of 1822 affirms, but to be exerted under different circumstances. In order to a proceeding under the former, the agency of an executor or administrator is unnecessary. The act does not point out any particular proof by which the court is to become informed, that an equitable division can not be made. The court then, may adopt the report of the commissioners as sufficient, or it may institute an inquiry, and require further evidence to convince the judgment.

Under the act of 1822, the personal representative is the principal actor: he commences the proceeding by filing his petition in the county court—parties being made and an issue made up, he goes on to make good its allegations by proof. It does not necessarily belong to the office of an administrator to see that the real estate of his intestate is divided between his heirs, or to obtain its sale, that the proceeds may be equitably distributed. The administrator may undertake this office, if he think proper, but if he omit it, he is not chargeable for an omission of legal duty. The one statute, then, imposes upon the court, an obligation to act *mero motu*; while the other only authorizes its action upon the request of the personal representative. In this view they are entirely reconcilable, and each can perform its appropriate functions, without interference with the other.

The law never favors the repeal of a statute by implication, unless the repugnance be quite apparent; and such repeal, car-

rying with it a reflection on the wisdom of former legislatures, it has ever been confined to the repealing as little as possible, of precedent statutes: 11 Rep. 63;¹ Dyer, 347.² And though two statutes be seemingly repugnant, yet, if there be no clause of *non obstante*, in the latter, they shall, if possible, have such construction, that the latter may not be a repeal of the former, by implication: *Rex v. Downs*, 3 T. R. 569. In *McCartee v. Orphans' Society*, 9 Cow. 437 [18 Am. Dec. 516], Woodworth, J., observes, that it is a well-settled rule, that where there is a discrepancy between two statutes, such exposition should be made, as that both may stand together if practicable: 1 Gall. 150;³ 2 Serg. & R. 185; 4 Gill. & J. 1.⁴

We cite these cases, not for the purpose of showing the correctness of our conclusions, for we do not admit any want of harmony between the acts of 1818, 1820, and 1822; but we cite them rather to prove the strong disposition of the courts, to reconcile statutes seemingly contradictory, instead of favoring an implied repeal.

2. Having determined what statutes were in force when the order of sale was made, we are next brought to consider what facts are necessary to give jurisdiction to the orphans' court, under the act of 1820; for it is clear that the proceeding, in the case before us, was intended to conform to that act.

It may be assumed as undeniable, that legislation is the only source whence the orphans' court derives its entire jurisdiction over the subject-matter, and if no warrant can there be found for its acts, they must be taken to be *coram non judice*. Before we enter upon the examination of this head, let it be premised, for the sake of perspicuity, that we employ the terms county and orphans' court, as designating the same tribunal. Following the designation of the legislature, either appellation is proper; but when spoken of with reference to its supervision over the estates of deceased persons, the latter is peculiarly so.

We understand that the proceeding of the orphans' court is *in rem* against the estate of the intestate, and not *in personam*. The order by that court, for the sale of real estate, so far as the question of jurisdiction is concerned, may well be compared to the condemnation of goods by a court of exchequer, where jurisdiction attaches upon a seizure—it merely professes to divest the title of the ancestor, without affecting the persons or other property of the heirs: *McPherson v. Cunliff et al.*, 11 Serg. &

1. *Foster's case*.

2. *Weston's case*.

3. *The Argo*.

4. *Chesapeake & Ohio Canal Co. v. Balt. & Ohio R. R. Co.*

R. 430 [14 Am. Dec. 642]. So, an order, at the instance of an administrator, for leave to sell the crop of the intestate, or to sell at public sale, his perishable property, is clearly a proceeding *in rem*, and requires no notice to those whose interests are concerned, in order to its validity. And in proceedings, according to the course of the admiralty, it is a universal rule, that a legal seizure, under lawful authority, gives jurisdiction, and decrees and sentences, under such circumstances, divest the title of the whole world, and pass *in rem adjudicatem*: 4 Cranch, 278;¹ 1 Paine, 626.² So, in a suit at common law, or in equity, where the court proceeds against the thing, a seizure of property by virtue of process issued from a court of competent authority, vests a complete jurisdiction in the court that issued it, over the thing seized. But in the case at bar, no process against the lot in controversy was necessary to give jurisdiction to the orphans' court—the statute which governs the proceeding does not require it, and the thing itself was subjected to the action of the court, for the purposes of a sale, so soon as it was sufficiently informed that no division could be equitably effected, without injury to the heirs.

In the case of *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88], the general rule, that the court rendering a judgment, must have jurisdiction, both of the cause and the parties, is explicitly recognized. In that case the action was commenced by attachment, and the goods of the defendant seized; and the court held, that though he may not have had actual or constructive notice of the pendency of the action, yet it was competent to proceed to judgment, and sell the property attached, in order to its satisfaction. But if the goods should prove insufficient, to the discharge of the judgment, the creditor could not sue an action on it out of the state, because the defendant was not personally amenable to the jurisdiction of the court rendering it. This case shows that a court may acquire jurisdiction of a cause, where the proceeding is *in rem*, without reaching by its process the person of the defendant, and that *quoad* the thing itself, the judgment is as conclusive as if the defendant was brought in by notice. In the present case, the orphans' court acquired a potential jurisdiction over the subject-matter, by the death of the ancestor, and that jurisdiction, if it did not attach earlier, was certainly put in actual exercise, whenever that court assumed to act upon the report of the com-

1. *Ross v. Hinely*.

2. *The Robert Fulton*.

missioners, which disclosed the fact that a division could not be equitably made, without injury to the heirs.

In the case of *Thompson v. Tolmie*, 2 Pet. 165, the validity of the proceedings of an orphans' court was collaterally drawn in question. The proceedings impugned, originated in the District of Columbia, and were founded on a law of Maryland, which declares, that in case the parties entitled to the intestate's estate can not agree upon a division; or in case any person entitled to any part be a minor, application may be made to the court of the county where the estate lies, and the court shall appoint and issue a commission to five discreet men, who are required to adjudge and determine whether the estate will admit of being divided, without injury and loss to all the parties entitled; and to ascertain the value of the estate. And if the estate can be divided without injury and loss to the parties, the commissioners are required to make partition of the same. And if they shall determine that the estate can not be divided without loss, they shall make return to the county court, and of the reasons upon which their judgment is formed; and also the real value of the estate. And if the judgment of the commissioners shall be confirmed by the county court, then the eldest son, child, or person entitled, if of age, shall have the election to take the whole of the estate and pay to the others their just proportion of the value in money: and on the refusal of the eldest child, the same election is given, in succession, to the other children, or persons entitled, who are of age: and if all refuse, the estate is to be sold under the direction of the commissioners, and the purchase money divided among the several persons entitled, according to their respective titles to the estate. But if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold until the eldest arrives to age, and the profits of the estate shall be equally divided, in the mean time. Under this law, it was held that the jurisdiction of the court over the subject-matter of the proceedings, did not depend on the fact that one of the heirs was of age, but attaches when the ancestor dies intestate, and any of the persons entitled to his estate is a minor: that the fact of the majority of one of the persons entitled could only become material in case the land was not susceptible of a division, without injury or loss to the parties. If it could be divided without injury, the commissioners were required to divide it, although all the heirs were minors. The materiality of the inquiry, whether any one of the heirs was of age, was altogether contingent, and might

never arise; and at all events, must depend upon the report of the commissioners, whether or not the property might be divided without injury. This must necessarily, therefore, be an inquiry arising in the course of the proceedings, and after the jurisdiction of the court attached.

The court in *Thompson v. Tolmie*, in determining what facts give jurisdiction under the statute of Maryland, go quite beyond what the present case requires us to decide, and consequently very fully maintain the jurisdiction of the orphans' court of Montgomery.

Though the act of 1820, makes it the duty of the judge of the orphans' court, to appoint commissioners, with a view to a division and distribution of the intestate's estate, within three months after the administrator shall have represented it solvent, yet there is no express inhibition of the court to act, without such representation from the administrator. And if the court appoint commissioners to divide the estate, we will not say, that the administrator may not arrest its action—he certainly may, if the estate be insolvent, by so representing it, conceding, *ex gratia, argumenti*, that this initiatory step of the court, in order to its regularity, must be preceded by a report of solvency; it lies with the administrator to object the want of it in abatement of the proceedings, and does not concern the interests of any one else. In the present case, the record discovers that the administrator had notice of the appointment of the commissioners, for he presented to the court their report, showing the impracticability of making an equitable division of the real estate of his intestate—and acts himself, as commissioner, in executing the order of sale. Having done thus much, he impliedly admitted the sale of the lands to be unnecessary, for the payment of debts, and could not, thereafter, be heard to object, in any form, to the regularity of the proceeding of the orphans' court. The jurisdiction, then, being clearly maintainable, under the act of 1820, and as that is all we propose to show, the strict conformity of the proceedings to its provisions, so as to relieve them from any valid objection on appeal or writ of error, need not be considered.

3. The jurisdiction of the orphans' court being shown, we are next to inquire, whether its proceedings can be collaterally impeached. In regard to proceedings in the ordinary course of law, it has been invariably holden, that the judgment of a court having jurisdiction of the parties and the subject-matter, is conclusive upon parties and privies; and this, though the record

may abound with irregularities, which would authorize its reversal by a revising court: *Newell v. Newton*, 10 Pick. 470; *Hale v. Williams*,¹ 6 Id. 232; *Mills v. Duryee*, 7 Cranch, 483; *Hampton v. McConnell*, 3 Wheat. 134;² *Young v. Gregory*, Hall, 446;³ *Messier v. Amery*, 1 Yeates, 533 [1 Am. Dec. 316]; 2 Dall. 54;⁴ *Hopkins v. Lee*, 6 Wheat. 109; *Barr v. Gratz*, 4 Id. 213; *Hughes v. Blake*, 1 Mason, 515; *Wright v. De Kline*, 1 Pet. C. C. 199; *Homer v. Fish*, 1 Pick. 435 [11 Am. Dec. 218]; *Livermore v. Herschell et al.*, 3 Id. 33; *Saxton v. Chamberlain*, 6 Id. 223;⁵ *Smith v. Lewis*, 3 Johns. 157 [3 Am. Dec. 469]; 1 Johns. Ch. 322;⁶ *Smith v. Sherwood*, 4 Conn. 276 [10 Am. Dec. 143]; *Ryer v. Atwater*, 4 Day, 432; *Bigelow v. Stearns*, 19 Johns. 39 [10 Am. Dec. 189]; *McDowell v. Van Denson*,⁷ 12 Id. 356; *Mather v. Hood*, 8 Id. 44; *Borden v. Fitch*, 5 Id. 121;⁸ *Thatcher v. Gammon*, 12 Mass. 268; *Smith v. Whiting*, 11 Id. 445; *Jacobs v. Hall*,⁹ 12 Id. 25; *Green v. Sarmiento*, 1 Pet. 74;¹⁰ *State v. Wakely*, 2 Nott & M. 410; *Hess v. Heeble*, 6 Serg. & R. 57; *Platner v. Best*, 11 Johns. 530; *Young v. Black*, 7 Cranch, 567.

It may then be assumed, that "the whole current of authorities recognize the principle, that where a cause has been instituted in a proper forum, where all matters of defense were open to the party sued, the judgment is conclusive, until reversed on error," upon the maxim *de fide et officio judicis non recipitur questio*. And indeed a different course of decision would have gone to place in uncertainty the rights of *meum* and *tuum*, and overturned the landmarks of property, the settlement of which was a cardinal object in the formation of the social compact. The sentences of courts, if liable to be incidentally revised and set aside, would so impair their efficacy, as greatly to detract from the dignity of the tribunals of justice. *Interest reipublicæ ut sit finis litium*, is a salutary maxim—while it would establish upon a firm basis, the interests which society proposes to protect, it imparts respectability to the institutions of the country.

In *Rose v. Himely*, 4 Cranch, 278, it is said, if a judgment be merely irregular, the courts of the country pronouncing the sentence, were the exclusive judges of that irregularity, and their decision binds the world: if *coram non judice*, the sentence is as if it never was pronounced. So, in *Kempe's Lessee v. Kennedy*, 5 Id. 186, in speaking of a court whose judgment is attempted

1. *Hall v. Williams*; S. O., 17 Am. Dec. 356.

2. *Hampton v. McConnell*, 3 Whart. 234.

3. 3 Call, 446; S. O., 2 Am. Dec. 567.

4. *Rapalge v. Emory*.

5. 6 Pick. 422.

6. *Smith v. Lowry*.

7. *McDowell v. Van Dusen*.

8. 15 Johns. 121; S. O., 8 Am. Dec. 225.

9. *Jacobs v. Hull*.

10. 1 Pet. C. C. 74.

to be impeached, the supreme court of the United States say, the judgment it gave was erroneous, but it is a judgment, and until reversed can not be disregarded. To same principle, 11 Mass. 229.¹

A decree in chancery, directing the sale of real estate, when collaterally drawn in question, can not be impeached; nor is a purchaser bound to look beyond it, if the facts necessary to give jurisdiction appear on the face of the proceedings. In *Windham v. Windham*, 3 Ch. 12,² an indirect attack was made on a sale under the decree of a court of equity; whereupon the lord keeper remarked, "You blow up with gunpowder, the whole jurisdiction, if such a purchaser is not protected." See also *Kitley v. Lamb*, 2 Id. 405.³

The orders of an orphans' court, though not obtained by the prosecution of a suit in the ordinary form of procedure, are assimilated to a judgment, and conclude all previous irregularities: 11 Serg. & R. 436.⁴ And in *Selin v. Snyder*, 7 Id. 166, it was decided that the orphans' court, acting within its jurisdiction, had power to grant the order for a sale of the real estate of the intestate—that the purchaser is bound to look to the jurisdiction, and if this is shown by the record, it is not allowable to dispute its verity, and thereby defeat the purchase.

In *McPherson v. Cunliff et al.*, 11 Serg. & R. 437 [14 Am. Dec. 642], in which the validity of an order of sale came collaterally in question, the doctrine is advanced, "that where there is a direct sentence on the very point, such is to be received as conclusive evidence, not to be impeached from within, but like all other acts of the highest judicial authority, is impeachable from without: and it is not permitted to show that the court was mistaken in the original action; it may be shown that they were misled by some collusive act between the parties: and this was decided by the opinion of all the judges of England, in the Duchess of Kingston's trial, in the house of lords:" 9 State Trials, 268. Here is a direct assertion of the conclusiveness of judgments upon all matters which were or are supposed by the record to have been before the court: these having passed *in rem adjudicatam*, are not subject to revision by any indirect proceeding, and can only be reversed or set aside by an appellate court. But it is competent to impeach a judgment for fraud, when collaterally drawn in question; because proof showing

1. *Perkins v. Fairfield*, 11 Mass. 227.

2. *Wyndham v. Wyndham*, 3 Ch. 22.

3. *Kitley v. Lamb*.

4. *McPherson v. Cunliff*; 8. C., 14 Am. Dec. 642.

collusion, does not contradict the record, but is in itself the introduction of something extrinsic.

So, in the case of *The Town of Canaan v. The Greenwood Turnpike Company*, 1 Conn. 1, Trumbull, J., in delivering the opinion of the court, said: "A judgment, decree, sentence, or order passed by a court of competent jurisdiction, which transfers, creates, or changes a title, or any interest in estate, real or personal, or which settles and determines a contested right, or which fixes a duty on one of the parties litigant, is not only final as to the parties themselves, and all claiming by or under them, but furnishes conclusive evidence to all mankind, that the right, interest, or duty belongs to the party to whom the court adjudged it."

In *Gervis and Wife v. Brown et al.*, 1 Nott & M. 329,¹ the decree of a court of ordinary, revoking the probate of a will, was held to be the judicial act of a court possessing jurisdiction over the subject-matter. And the exercise of this right was held so inviolable, that evidence would not be permitted to contradict the matters adjudged, but it could only be set aside upon appeal. To the same effect is *Scott v. Hancock*, 13 Mass. 162.

In *Mooers v. White*, 6 Johns. Ch. 384, Chancellor Kent approves the doctrine of the conclusiveness of an order of sale, and places his opinion upon the competency of the jurisdiction of the court making it. So, in *The Heirs of Ludlow v. Johnson*, 3 Ohio, 560 [17 Am. Dec. 609], it was determined, that where the court making an order of sale had jurisdiction, a collateral inquiry will not be allowed to show whether its jurisdiction was improperly exercised. Though the order be unadvisedly or erroneously made, the purchaser has acquired rights he can not be divested of, by any indirect proceeding; and so far as the interests of purchasers are concerned, it is considered equally available as a judgment. And to the same effect is *Sumner v. Parker*, 7 Mass. 79, where, examining the conclusiveness of a decree of a judge of probate, the court remark, that if within the sphere of his authority, the judge mistakes the application of the law, the decree is voidable, and may be reversed by an appellate tribunal; and is in force, until its reversal. But if a decree be made upon a subject, without the jurisdiction of the judge, it needs no reversal, it is void. And in *Wales v. Willard*, 2 Id. 120, the distinction between void and voidable judgments, is clearly recognized. So, *Perkins v. Fairfield*, 11 Id.

1. *Brown v. Gibson*.

227, is a direct authority to show that a title acquired, by purchase made on sale, under an order for the sale of the real estate of an intestate, is valid, if the court making the order had jurisdiction, though its proceedings are erroneous. To same point see *Elliott et al. v. Peirsol et al.*, 1 Pet. 340.

In *Thompson v. Tolmie*, 2 Pet. 168, the decision in *McPherson v. Cunliff* is cited with approbation, and the court reaffirm the doctrine, that where there is a fair sale, and the decree executed by a conveyance from the administrator, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction, appear on the face of the proceedings. After a lapse of years, presumptions must be made in favor of what does not appear. And further, "the decree of an orphans' court, in a case within its jurisdiction, is reversible only on appeal, and not collaterally, in another suit."

The same court, in the case of *Voorhees v. The United States Bank*, 10 Pet. 474, again declare, that the errors of a court do not impair the validity of its judgments; and that any objection to its full effect, when impugned by an indirect proceeding, must go to the authority under which it was rendered. If a court usurps jurisdiction, its act is void; but if, in the exercise of a lawful power, it errs in judgment, its acts are merely voidable, and remain in full force, until set aside by a revising tribunal. The orphans' court, in the exercise of its authority over the real estate of an intestate, has been assimilated to a court of equity. Considering the manner of its procedure, and the extent of its discretion over the subject, the comparison is not perhaps entirely inapt.

No injury can result from the conclusion, that the jurisdiction being shown, it is not competent to invalidate the order of sale, when introduced in evidence, as a link in the chain of title—for an appeal, or writ of error is given by statute, "from any judgment or order final, within vacation or term time" of the county court, to the circuit or supreme court. Let, then, the review we have taken of the authorities suffice to show that judicial sentences, whether designated as judgments in the courts of law, decrees in chancery, or orders of an orphans' court, if not founded in a usurpation of power, are conclusive, until reversed by a higher tribunal. We proceed now, to fortify this conclusion.

In the case of *The Lessee of Goforth v. Longworth*, 4 Ohio, 129 [19 Am. Dec. 588], it is held to be well settled, that courts give a liberal construction to statutes authorizing sales of real estate

by executors and administrators. Public policy requires that all reasonable presumptions should be made in support of such sales, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, render this necessary. If a different rule prevailed, purchasers would be timid, and estates consequently be sold at a diminished value, to the prejudice of heirs and creditors.

In favor of innocent purchasers, the cases cited from 2 and 10 Peters' reports, and 11 Sergeant & Rawle's reports, very fully maintain the same doctrine: and it is certainly compatible with the purest principles of justice. Who would consent to become a purchaser at such a sale, if he was to be made responsible for every irregularity in the proceedings of the court that ordered it?

Again: the rules of law are in general so framed as to favor the fair purchaser. If a judgment is reversed for error in the record, the defendant can only obtain restitution of the money, while the purchaser shall hold the property sold for its satisfaction: 10 Pet. 475;¹ 6 Har. & J. 204;² 1 Cow. 642.³ So it has often been made a question, whether a *bona fide* purchaser of land, under an execution issued upon a judgment which had been paid, but no satisfaction entered of record, would not be protected in his purchase: 1 Cow. 622.⁴ A sale under an irregular execution, which is merely voidable, passes title to the purchaser: *Blaine v. The "Charles Carter,"* 4 Cranch, 328.

It remains to examine more particularly the legal correctness of the charge given, as well as the refusal of that asked in the circuit court.

1. The instruction given asserts, in the first place, that if the administrator sold the real estate of his intestate, without giving bond to sell according to law, his proceedings were absolutely void. The thirtieth section of the act of 1803 requires, that the personal representative, before he obtains the order of sale from the clerk of the orphans' court, shall enter into bond with sufficient sureties, etc. This is the only statute which requires such a bond, and was, of course, in the contemplation of the judge when he gave the charge. The omission to execute this bond can not be held to avoid the sale. It is made the duty of the clerk to require it before he furnishes the administrator with a copy of the order; but if, regardless of this requisition of the act, he issues a copy, an innocent purchaser can not be preju-

1. *Foorhes v. Bank of the United States.*

2. *Barney v. Patterson.*

3. *Jackson v. Cadwell.*

4. *Jackson v. Cadwell.*

diced. The purchaser is not to supervise the clerk in the performance of his duties, but may well infer the execution of the bond, from the fact that he has furnished the administrator with the warrant for a sale.

2. The second head of the charge is not very intelligible. If it be understood as asserting, that everything necessary to legitimate the action of the orphans' court should appear of record, or else the proceedings of that court were void, our views upon another branch of the case negative its correctness. But if the court intended to say, that the facts necessary to give jurisdiction should appear of record, or else the proceedings were *coram non judice*, and of consequence void, it was clearly right: *Kempe v. Kennedy*, 1 Pet. C. C. 30-36; *Stanley v. Bank of America*,¹ 4 Dall. 11; *McCormick v. Sullivant*, 10 Wheat. 192; *Life v. Mitchell*,² 2 Yerg. 400; *Williams v. Blunt*, 2 Mass. 213; *Shivers v. Wilson et al.*, 5 Har. & J. 130 [9 Am. Dec. 497]; *Wickes v. Caulk*, Id. 36; *Thatcher v. Powell*, 6 Wheat. 119. It is needless to undertake an interpretation of the meaning of the judge, as the judgment, without reference to this part of the charge, can not be sustained.

3. The bill of exceptions states that the defendant below moved the court to instruct the jury, that if they believed that the county court had jurisdiction of the subject-matter, a defect in the notice and publication of the time of sale rendered the proceedings only voidable, and binding until reversed. This instruction was refused, and the court charged the jury, that all the requirements of the statute in such case must appear of record, and in their absence, the proceedings were absolutely void. There is certainly no error in the refusal to give the instruction asked—for there was no evidence as to the notice of the time of sale; and the opinion which the court was required to express, could have had no influence upon the verdict of the jury, but was abstract and irrelevant.

Again: the motion for an instruction supposes that it is immaterial how the sale was conducted, if the court decreeing it had jurisdiction of the subject-matter of the proceeding. In this view, it is believed that it should have been denied. If the authority of the court is shown of record, any subsequent irregularity in its action, would not make the decree void, but, at most, merely voidable. Yet, if the decree (as it should do) prescribes certain formalities, preparatory to the sale, they must be observed, or the authority to sell can not be well exe-

1. *Turner v. Bank of America.*

2. *Life v. Mitchell.*

cutted. Where particular forms are pointed out, for the execution of a power, however immaterial they may appear, in themselves, these forms are considered as conditions, the observance of which can not be dispensed with: *Nixon v. Hyserott*, 5 Johns. 58; *Hunt v. Chamberlain's Ex'rs*, 3 Halst. 336 [14 Am. Dec. 427]; *Denning v. Smith*, 3 Johns. Ch. 344; *Hudson v. Hudson*, 6 Munf. 352; *Combe v. Brazier*, 2 Desau. 431; Sug. on Pow. 364. An authority to an administrator to sell the estate of his intestate is a personal trust, and must be strictly pursued: *Bryan et al. v. Hinman*, 5 Day, 211; *Lockwood v. Sturdevant*, 6 Conn. 373; *Berger et al. v. Duff*, 4 Johns. Ch. 368. So also is an authority given to an executor, by will, to sell: *Pendleton and wife v. Fay et al.*, 2 Paige, 202.

It is necessary, then, that the administrator should do everything required by the order to be done, previous to the sale, or the sale passes no title. But the purchaser can not be prejudiced by the omission of an administrator to perform any act, after the sale. The interest acquired by his purchase can not be lost by a failure to make a return to the orphans' court, of the proceedings under the order: 5 Day, 211;¹ 1 Dall. 486;² 5 Wheel. Abr. 258.

4. The last instruction complained of is substantially this, that unless the sale of the lot in controversy was conducted agreeably to the act of 1822, governing the sale of intestates' estates, the title of the heirs was not divested; and that that act repealed all others of a previous date, on the same subject, so far as they were in conflict. We have already shown that the acts of 1818 and 1820 are in harmony with that of 1822, so far as they confer jurisdiction upon the orphans' court. The statute of 1803, so far as it gives authority to that court to direct the sale of land, is impliedly repealed by that of 1822, yet the mode of procedure it provides still continues in force, and is applicable to proceedings under the acts of 1818 and 1820—and the charge maintaining the reverse can not be sustained. The form in which some of the instructions were asked and given, seems to us to have been objectionable, by referring questions of law to the jury: yet as it can subserve no purpose, we deem it unnecessary to particularize them.

We are aware, that in this opinion, we run counter to some of the reasoning and conclusions of this court, in the case of *Wiley and Gayle v. White and Lesley*, 2 Stew. 331; 3 Stew. & P. 355, which was twice here. The very great respect we enter-

1. *Bryan v. Hinman*.

2. *Gragg v. Smith*.

tain for the learning of the judges who concurred in the opinions, in that case, and the propriety of upholding the doctrine of *stare decisis*, have induced us to give to this case a more careful and elaborate examination. Principles, the opposite of those we have stated, would be productive of the severest and most extensive injury. It is impossible to conjecture the vast amount of property holden under sales, made by order of an orphans' court; and we all know, that in at least three fourths of the cases, the records are remarkable for their want of technicality and legal precision. Let the rule be established and continued, which requires the record to disclose every material fact, and which makes indispensable to the passing of title, publication of the petition to sell, the return of the sale, the execution of a bond by the administrator, to the orphans' court, and everything else which the statute prescribes as preparatory to a decree, and a large majority of the titles acquired through such a channel, would be overturned. In questions of doubt, arguments drawn *ab inconvenienti*, deserve great consideration—yet we need not invoke their aid in this case, for authority is full, to sustain every point we have determined.

It is worthy of remark, that the distinction between void and voidable judgments, seems not to have been considered in the case of *Wiley and Gayle v. White and Lesley*, but it is assumed that the proceedings of the orphans' court may be collaterally impeached, for an omission to disclose, by its record, an observance of everything enjoined by statute, upon the ground that it is a court of limited jurisdiction. This reasoning only proves the order to have been voidable, if the authority of the court was shown, and would hold good, on an appeal or writ of error—but does not show, that it was void *per se*, so as to subject it to an indirect attack.

The views already expressed, relieve us from a more extended review of the case last cited; and without attempting to recapitulate, it remains but to declare, that the judgment must be reversed and the cause remanded.

GOLDTHWAITE, J., not sitting in this cause.

PROCEEDINGS IN ORPHANS' COURT, FOR SALE OF LAND, ARE IN REM: *Redmond v. Collins*, 27 Am. Dec. 208; *Union Bank of Tennessee v. Jolly's Adm'rs*, 18 How. (U. S.), citing the principal case; *McPherson v. Cunliff*, 14 Am. Dec. 642.

CONCLUSIVENESS OF PROCEEDINGS OF ORPHANS' COURT; See *McPherson v. Cunliff*, 14 Am. Dec. 642, and note 663, where the subject is discussed at length; *Roach v. Martin's Lessee*, 27 Id. 746.

ROBERTS v. ADAMS.

[6 PORTER, 361.]

ASSUMPSIT BY ONE SURETY AGAINST THE OTHER FOR CONTRIBUTION can be sustained as soon as the former has paid the debt for which they are sureties; it need not be shown that the principal debtor is insolvent, nor that payment from him can not be obtained.

ASSUMPSIT. The opinion sufficiently states the facts.

Clarke, for the plaintiff in error.

Phillips, for the defendant in error.

GOLDTHWAITE, J. This is an action of assumpsit on the common counts; and the only question which is presented for revision, arises out of the bill of exceptions taken by Roberts on the trial of the cause—by which it appears, that the plaintiff and defendant were the co sureties for Ross and Roberts to a promissory note on which Adams was sued and compelled to pay. No proof was adduced to show the insolvency of Ross and Roberts. On the evidence, Roberts requested the circuit court to instruct the jury, that before Adams could entitle himself to a recovery, the insolvency or inability of Ross and Roberts must be made apparent. This instruction was refused, and the refusal is here assigned as error.

Since the case of *Cowell v. Edwards*, 2 Bos. & Pul. 268, it has never been questioned in England, that one co-surety has a right of action against another, as soon as he is compelled to pay the debt for which they were joint sureties. Nor has a contrary doctrine ever been asserted in this country except in the state of Kentucky. In the case of *Pearson v. Duckham*, 3 Litt. 384, the court of error and appeals of that state, in a case which can not be distinguished from the one now before us, decided that the right of one surety to recover from another, his proportion of the money paid on account of the suretyship, was dependent on the insolvency of the principal debtor. The grounds on which the decision is made to rest, are two-fold: 1. That the action at law is derived from the courts of equity, and that such courts never decree in favor of one surety against another, unless the principal debtor is insolvent; and 2. That because the legislation of that state had given a summary remedy in favor of one against another co-surety when the principal debtor is insolvent, this must be regarded as a legislative exposition of the law of co-suretyship.

The first of these positions would be very difficult to sustain

on principal or authority, for it is nowhere laid down, that the allegation of insolvency is one which is either necessary to be made or supported by proof. The principal debtor may be a necessary party to the bill, but is alone so, on the ground that he is interested in the subject-matter of the suit, and perhaps also in the object of it, and his presence may be necessary to enable a chancellor to scale the claims of all the parties. Indeed, it might very frequently be a matter of great doubt, whether the principal debtor was able to respond for any portion of the sum paid; and the right of contribution would thus be made to depend, not on fixed principles of justice and equity, but on the prosecution of a suit which might or might not be available, according to circumstances.

The second position on which the case cited is made to rest, is common to this state; for we have a similar statute to that of Kentucky, which authorizes one co-surety, who has paid money on a judgment, to move against another, for his proportion of the debt, when the principal debtor has proved insolvent. We can not yield our assent to the proposition, that the enactment of this statute is equivalent to a repeal of the previous law in relation to co-sureties. The legislature might well refuse to give a summary remedy to one surety against another, when the principal debtor was solvent, and yet not intend to make the recovery, in other modes of proceeding, dependent on the fact of insolvency.

It does not admit of question, that the rule as laid down in the case of *Cowell v. Edwards*, before cited, is the existing law of co-suretyship, and that the right to sue is consequent, on the legal payment of the money, for which the sureties are justly bound.

The judgment is affirmed.

The questions involved in this decision are considered in the note to *Morrison v. Poyntz*, 32 Am. Dec.

BOREN v. McGEHEE.

[6 PORTER, 432.]

PAYMENT OF JUDGMENT BY SHERIFF, WITHOUT KNOWLEDGE OF DEFENDANT
in execution, is a discharge thereof, and has the same effect as if made by the defendant.

ATTORNEY FOR PARTY TO ACTION HAS NO AUTHORITY TO ASSIGN JUDGMENT
rendered therein for his client.

ASSIGNMENT OF JUDGMENT MADE ON SHERIFF'S DOCKET, the same being a private memorandum-book which the law does not require him to keep, is not notice to any one except the parties to the transaction.

EXECUTION IS VOIDABLE MERELY, BUT NOT VOID, when issued upon a satisfied judgment, where such satisfaction has not been entered on the record.

TITLE OF PURCHASER AT SHERIFF'S SALE IS NOT AFFECTED by the fact that the sheriff had an interest in the judgment, where such interest did not appear of record, and was unknown to the purchaser.

ERROR to the circuit court of Montgomery county. The opinion states the case.

Campbell, for the plaintiffs in error.

Dargan, *contra*.

ORMOND, J. This was an action of trespass, to try title to two lots of land in the town of Montgomery, brought in the court below by the defendant in this court, against the plaintiffs. A bill of exceptions was taken to the opinion of the court, which shows the following facts: Spyker and Bradford, at the November term, 1836, of Montgomery county court, obtained a judgment against Boren, upon which an execution issued, returnable to the May term following, which was returned at the return term, indorsed, "Levied on the lots in controversy, as the property of David Boren." The attorney of Spyker and Bradford demanded and received from the sheriff the debt, damages, and tax fee—the residue of the costs were not paid. The sheriff then received from the plaintiffs' attorney an assignment of the judgment on the execution docket of the sheriff, in these words:

"For value received, I assign this judgment and execution to Bushrod W. Bell, sheriff.

(Signed) A. MARTIN, plaintiffs' attorney."

The defendant, Boren, had paid nothing. An *alias fi. fa.* issued, returnable to the next term of the court, under which the said sheriff, Bell, levied and sold the lots of land in controversy to the defendant in this court, and conveyed the same to him by deed. It did not appear that the defendant had notice of the payment of the judgment, or of the assignment to the sheriff. The plaintiff, Garrett, in this court (defendant below), produced a deed from Boren to him, for the same lots, the execution of which was subsequent to the rendition of the judgment, but prior in date to the deed from the sheriff to the defendants. On these facts, the court charged the jury, that although the sheriff became interested in the judgment, by the assignment.

of the plaintiffs' attorney, to the extent of the terms of said assignment, that his interest did not vitiate the sale to the defendant, who had no notice thereof, and that it was such a transaction as he was not bound to notice.

The court also refused to charge the jury, if they believed that the sheriff was the owner of said judgment, he was incapable of executing the commands of the *fi. fa.*, under which the property of the defendant, Boren, was sold; because the question was abstract. And also refused to charge the jury, that the entry upon the execution docket of the sheriff, of the assignment to the sheriff, was notice to all persons of his interest in the judgment. To the charge given, as well as to those refused, the defendants below excepted, and now assign the matters of law arising thereon to this court as error.

Two questions arise in this case: 1. Can a purchaser of land, at a sheriff's sale, without notice, be affected by the discharge of the judgment under which he purchases by payment, no satisfaction having been entered of record? 2. Will the interest of the sheriff in the proceeds of the sale under the execution, affect the title of a *bona fide* purchaser, without notice of the interest, such interest not appearing of record?

These are grave questions, and have received our attentive consideration. Before proceeding to the examination of the question, it may be well to disembarass the case of some matters, which were urged by the counsel for plaintiffs. It appears from the evidence set out in the bill of exceptions, that at the return term of the first writ of *fi. fa.* sued out on the judgment, the money was not made thereon; but that the sheriff himself paid the plaintiff's attorney, the debt, interest, and tax fee; leaving the residue of the costs unpaid. The sheriff then took from the plaintiff's attorney, an assignment of the judgment on his own docket of executions, in these words:

"For value received, I assign this judgment and execution to Bushrod W. Bell, sheriff.

(Signed) A. MARTIN, plaintiffs' attorney."

We consider this payment by the sheriff made, as it appears, without the knowledge or consent of the defendant in execution, a payment and discharge of the judgment (except for the small amount of costs unpaid), and in law, will have the same effect, and be attended by the same results, as if made by the defendant.

The assignment of the judgment by the plaintiffs' attorney,

conveyed no interest whatever to the sheriff. It does not appear that he had any authority to act for the plaintiff, beyond the power delegated to him as an attorney and counselor at law. That authority ceased with his collection of the money, and would not at any stage of the proceedings, have authorized him to sell or transfer any interest in the judgment, or the note or bond on which it was founded. But if he were an attorney in fact, his assignment would convey no interest. The assignment does not purport to be in the name of the principal, but is in his own name, and for this reason it would not be a valid execution of the power. Again, the assignment, if by a lawfully authorized agent, and made in the proper manner, would not, of itself, be notice to any one; it was made on the "sheriff's docket," which, as the law does not require him to keep such a book, we presume must have been his own memorandums of executions in his hands, kept in his own office. It was his own property, and it is too clear to admit of argument, that a memorandum in such a book as this, could not be notice to any one, but the parties concerned in the transaction.

We proceed to the examination of the main question, on which the decision must rest. None of the cases cited by the plaintiffs' counsel, maintain his proposition, that the execution is absolutely void, and not voidable merely. For it is properly conceded, that if the execution is voidable only, the purchaser may defend himself under it. One of the cases most relied on by the plaintiff's counsel, is the case of *Woodcock v. Bennet*, 1 Cow. 711 [13 Am. Dec. 568]. In that case, a judgment had been obtained against two persons—one of them died after judgment; and after his death, and more than a year and a day after the rendition of the judgment, and without its being revived by *scire facias*, the plaintiff sued out an execution and sold the lands of the defendants. Woodworth, J., in delivering his opinion, which was adopted by the whole court, after commenting for some time, on the question of erroneous and irregular, or void process, says: "The execution may be said to be irregular and void; for it directs to levy on the goods and chattels of a person not in being, and for want thereof, to be made of his lands, which may have been held by persons strangers to the judgment, and ignorant of the proceedings." Again—"I apprehend the reason, why an execution is considered voidable merely, when issued on a judgment where no change of parties is required—and that an execution is void, when issued to charge the lands, after the death of the defend-

ant, without *scire facias*, will be apparent on this further consideration. When issued after a year and a day, and the parties not changed, the defendant may or may not, at his election, raise the question of regularity. The law permits the plaintiff to issue it, and considers it regular at the time of issuing it, subject to be defeated, on the application of the defendant. If he apply before execution executed, the sale will be arrested, and all proceedings under it cease; if he lie by, until after sale, then on the principle that the execution is erroneous process, and good until reversed, he can not recover the goods sold; he can only call on the plaintiff for the money recovered. In the other case, the act of issuing the execution is not warranted by law. This forms the substantial distinction between void and voidable process."

The rule is correctly laid down in *Luddington v. Peck*, 2 Conn. 700, by Gould, J.: "The irregularity must be in the process itself, or in the mode of issuing it; it can not be irregular when sued out according to the established course of practice."

It is clear that this authority will not support the position of the plaintiffs' counsel. The case is materially variant from this in one most important particular. The defendant in the execution was dead; and from the plainest dictate of common justice, his lands could not be sold to the prejudice of his heirs: or, as the court intimated, of some third person claiming under him, who might never have heard of the judgment: as little will the reasoning of the court avail. "The term voidable, implies that there is a party who may avoid." Here there was a party, who might have avoided the process; yet he chose to lie by, until an innocent purchaser invested his money in the land.

The case of *Jackson v. Cadwell*, 1 Cow. 623, was relied on by the counsel on both sides. It was a contest between the original parties to the judgment; and therefore not in point. Yet in that case, Woodworth, J., says: "In the case now under consideration, the party seeking to avail himself of the irregularity of the sale, was a defendant who stood by and looked on while his property was sold, by virtue of an execution which had been paid, as he now alleges. No effort was made on his part to stay the proceedings or set aside the sale, either by motion to the court, or by *audita querela*. Had the property been purchased by a third person, a stranger to the transaction between the parties to the execution, I should deny the plaintiff's right to recover." It appears to us that this reasoning is sound, and based on the firmest principles.

The case of *Jackson v. Anderson*, 4 Wend. 485,¹ was an action of ejectment, for land purchased at a sheriff's sale. In that case, the purchaser knew that the judgment had been previously satisfied, and the cause went off on that ground. In his opinion, Justice Sutherland says: "Conkey therefore acquired no title by his purchase at the sheriff's sale, having purchased with full knowledge that the judgment and execution had been previously satisfied and discharged; and the defendant is not estopped from contesting his title." In *Swan v. Saddlemire*, 8 Id. 676, one of the questions mooted, was the one we are discussing. The judge says: "I am strongly inclined to the opinion, that an execution, issued upon a judgment which has been paid and satisfied, is to be considered absolutely void, and not voidable; and that the purchaser under such execution, would acquire no title." He afterwards says, he gives no definite opinion, as it was not necessary to a decision of the cause.

The case in 7 Cow. 1,² was where there had been a previous levy, which the court held to be a satisfaction. They say, "admitting a *bona fide* purchaser, without notice, could protect himself, that could not help in this case, as the purchaser had notice." In 7 Johns. 426,³ the case was a motion by the defendant to set aside the *fi. fa.*, the execution having been paid by the sheriff. The motion was allowed. 15 Johns. 444,⁴ was a payment of the execution by the sheriff and another levy and sale. The suit was against the sheriff.

The case referred to in 18 Johns. 441,⁵ was an action of ejectment to recover lands sold for taxes, which had been paid. The court determined that as the lien on the land was only given on default of the payment of taxes, the sale was a nullity. It is not perceived that this has any application to this case. In *Freeman v. Ruston*, 4 Dall. 214, a *fi. facias* issued, after the defendant had been taken, and while he was in custody on a *ca. sa.*, held that the *ca. sa.* operated as an extinguishment of the lien of the judgment, and was a satisfaction of the debt. The case of *King v. Goodwin*, 16 Mass. 63, was similar in principle to the last. The plaintiff, after the defendant was committed on a *ca. sa.*, caused his lands to be extended. *Hammatt v. Davenport*, 9 Id. 138, was an action brought by the defendant in execution, against the sheriff, for selling property on an execution which had been previously satisfied—held that there was no authority for the second levy.

1. 4 Wend. 474.2. *Jackson v. Bowen*.3. *Reed v. Pruyn*; S. C., 5 Am. Dec. 287.4. *Sherman v. Boyce*.5. *Jackson v. Morse*; S. C., 9 Am. Dec. 225.

We have thus briefly stated the cases relied on by the plaintiff's counsel, and we think they do not sustain the position assumed by him. No one of them is precisely in point, though in some of them the opinion is expressed, that in a case like the one at bar, the title of the purchaser would be sustained. In most of the cases the original parties to the judgment were before the court, and in these cases the decisions meet our approbation. We think that even as to the cases cited by the counsel for the plaintiffs, the weight of authority is against him; but it can not be denied, that there is considerable fluctuation of opinion; the point does not seem to have been definitely settled in the United States; it is certainly an open question in this state, and we feel ourselves called upon to settle it on such grounds as are warranted and sustained by analogous principles of well-settled law.

In *Jeanes v. Wilkins*, 1 Ves. sen. 195, we find an express authority in favor of the purchaser at a sheriff's sale, without notice that the defendant in execution was then in custody on a *ca. sa.* It is difficult to perceive, on principle, any difference between a satisfaction in fact, of a judgment, by the payment of the money, and a satisfaction in law, by taking the defendant in custody on a *ca. sa.* The facts were these: a creditor having the body of his debtor in execution under a *ca. sa.*; during the continuance thereof, the sheriff sued out a writ of *fieri facias*, and levied on a leasehold of ninety-nine years. The leasehold was not sold until after the *fi. fa.* had expired, and then without a *venditioni exponas*. The lord chancellor (Hardwicke) determined, "that to avoid the sale and title to the defendant, it must be proved that the *fi. fa.* was void, and conveyed no authority to the sheriff; for it might be irregular, and yet if sufficient to indemnify the sheriff, so that he might justify in an action of trespass, he might convey a good title, notwithstanding the writ might be afterwards set aside. It is said, that by law, during the existence of the *capias* and the person in custody, a *fi. fa.* ought not to be taken out; and certainly it ought not; although if the defendant dies, the plaintiff may have a new execution, as upon the statute 21 Jas. I.; yet while that continues, resort can not be had to any other execution; and the court, without putting the party to his *audita querela*, would (as I apprehend) set it aside on motion. But yet that *fi. fa.* was not void, and the sheriff might justify taking this leasehold by that writ, and so may the purchaser under the sheriff who gains a title; otherwise it would be very hard,

if it should be at the peril of a purchaser under a *fi. fa.*, whether the proceedings were regular or not."

This decision of this eminent judge is an authority directly in point, unless it can be shown that there is a difference between a satisfaction in fact, and a satisfaction in law; a distinction which we believe does not exist.

It also establishes the principle, that in such a case the sheriff might justify in an action of trespass against him. The language of the case is: "But yet that *fi. fa.* was not void, and the sheriff might justify the taking by this writ." To the same effect is the case in 1 Stra. 509.¹ Where the court issuing the process has general jurisdiction, and the process is regular on its face, the officer is not, though the party may be, affected by an irregularity in the proceedings: see also *Savacool v. Boughton*, 5 Wend. 170 [21 Am. Dec. 181]. If, then, it be true, that the sheriff may justify where the process is regular on its face, and the court has a general jurisdiction, the sheriff may justify for executing a *fi. fa.* which has issued on a judgment which has been paid, no satisfaction having been entered on the record: and if so, it can only be because the process is not void, but voidable only. It is true, that if the sheriff is an actor in the transaction, conusant of the fact, he may be compelled to respond in damages to the injured party, as may also the plaintiff.

The question has been compared in argument to the case of a lien created by the act of the parties; and it is insisted, that the payment of the money destroys the lien; and there can be no doubt that it does. But if in the case of a satisfied mortgage or deed of trust, the mortgagor or debtor should look on with folded arms, and permit a purchaser without notice to invest his money in the subject of the trust or mortgage, would he not lose the benefit of his payment? That this is the law, might be established by a multitude of cases: See *Green v. Price*, 1 Munf. 449; *Taylor v. Cole*, 4 Id. 351 [6 Am. Dec. 526]; *Niven v. Belknap*, 2 Johns. 573.

If we should decide, that in a case circumstanced like this, a recovery could be had against the purchaser at sheriff's sale, confidence would be destroyed in such sales, and the consequences would be most injurious. Not only would it affect the value of property so exposed, but the fair purchaser would lose his money, invested under the sanction of the tribunals of the country—while on the other hand, by deciding that the process

1. *Phillips v. Biron*.

is not void, but voidable only, and that the fair purchaser without notice, may acquire title under it, we preserve the general symmetry of the law. The defendant, as has been already stated, has his remedy against the plaintiff, in the execution, as well as against the sheriff, if by his conduct he has made himself obnoxious to a suit.

Can the interest of the sheriff in the judgment (such interest not appearing of record, and being unknown to the purchaser), affect his title to property, purchased at the sheriff's sale? We think it can not. It would let in all the mischiefs which would be produced by declaring the process void. It is certainly true, that the sheriff has no power to pay the money due on the judgment, and keep the execution open for his own benefit. To allow such a traffic, would open a door to the greatest abuses, and be an invitation to extortion. Armed, as he is, with the coercive power of the law, the defendant would not deal with him on equal ground, and would be obliged to accede to such terms as avarice, inflamed by opportunity, and hardened by power, would be satisfied to impose. The defendant would have the undoubted right, in such a case, to arrest the process, and stop its execution; but should he decline doing so, and permit the process to be executed, it is impossible that the *bona fide* purchaser at the sale, without notice, should be disturbed.

We have been referred to the case of *Carter v. Harris*, 4 Rand. 199. The case was this: A person named Dickie, conveyed by deed to trustees, all his estate, for the maintenance of his wife and children. At the execution of the deed, he owed one Claiborne one hundred dollars, secured by note. This note was assigned to Harris, who was a deputy sheriff. Harris sued, and obtained judgment thereon against Dickie, and directed the clerk to assign the execution to his father. He afterwards levied the execution on a negro, and at the sale became the purchaser himself, at about one fourth of the value of the slave. There was but one bidder present beside himself. A bill was filed by the trustees to vacate the sale.

In determining the case, the court conclude from the evidence, that the assignment to the father was merely colorable, and at all events, that he was liable over to his father. On this hypothesis, the objection arising from his interest appearing on the record, was not removed. The decision, however, is made to turn on the fact, that the sheriff was the purchaser himself, and that the sale was not fair.

It is clear that this is not a decision on the point under discussion. It lacks the essential ingredient to make it applicable—want of notice of the sheriff's interest. We think, that on principle, as well as on authority, a latent interest existing in the sheriff, in the avails of the execution, and not appearing on the record, will not affect a purchaser at a sale under such execution, without notice of the interest. The conveyance of the premises to Garrett, after the judgment, can not affect the title of the purchaser under the execution, even if he were a *bona fide* purchaser for valuable consideration, which is not shown by the record. He can be in no better situation than his vendor.

We have not taken notice of the fact that the execution was not entirely satisfied, there being a portion of the costs unpaid. We should be inclined to the opinion that a small portion of, or indeed all, the costs being unpaid, would not justify the issuance of an execution for the whole amount of the judgment. It is not however necessary to decide that point in this case.

The judgment of the court below is affirmed.

ATTORNEY AT LAW HAS NOT AUTHORITY TO ASSIGN JUDGMENT: *Head v. Gervais*, 12 Am. Dec. 577, note 582; nor to discharge defendant from custody without satisfaction: *Kellogg v. Gilbert*, 6 Id. 335; *Treasurers v. McDowell*, 26 Id. 166; nor to enter a retraxit: *Lambert v. Sandford*, 18 Id. 149; nor to compromise a suit by taking land instead of money: *Huston v. Mitchell*, 16 Id. 506; nor to receive a bond in satisfaction of the judgment: *Smock v. Dade*, Id. 780: The principal case is cited in *Leach v. Williams*, 8 Ala. 764, to the point that an attorney at law may not have the power to assign a judgment after it is satisfied to one who became liable to its payment.

TITLE OF PURCHASER AT EXECUTION SALE is not affected by mere errors or irregularities in the proceedings: *Blight's Heirs v. Tobin*, 18 Am. Dec. 219; *Gardiner Mfg Co. v. Heald*, 17 Id. 248; *Cox v. Nelson*, 15 Id. 89, note 92; *Armstrong v. Jackson*, 12 Id. 225; *Darby v. Russel*, 9 Id. 767.

OFFICER INTERESTED IN SUIT can not serve process therein: *Singletary v. Carter*, 21 Am. Dec. 480.

MORROW v. CAMPBELL.

[7 PORTER, 41.]

NON-PERFORMANCE OF AN EXPRESS COVENANT can be excused only by showing that its performance is unlawful, or has been rendered impossible by the intervention of causes beyond human control.

AGREEMENT THAT A CONTRACT MAY BE RESCINDED by a return of the deed by which it is evidenced by a certain day, can not, if the deed be lost, be fulfilled by the grantee's informing the grantor thereof, and further, that he renounces the benefit of the contract.

DEFENDANT CAN NOT PROVE THE LOSS OF A DEED, if the loss, if proved, would absolve him from liability in the action.

COVENANT. The sealed agreement upon which the action was founded, recited that plaintiff, acting as attorney for Charles Gamble, had sold Charles Peters a certain patent right for the territory of Arkansas, for the sum of five hundred dollars, which sum thereupon defendant and said Peters agreed to pay plaintiff, unless the contract of sale was rescinded, on or before October 1, 1833, by a return of the deed of sale of said right to plaintiff. On or before that day, plaintiff was informed that the deed of sale was lost, and that Peters abandoned the contract. Defendant, against plaintiff's objection, testified to the fact of the loss of the deed. The jury was charged that the loss of the deed, if proved, connected with the other facts of the case, constituted a defense. There was verdict and judgment for defendant; whereupon plaintiff brought up the case upon writ of error.

Hopkins and Parsons, for the plaintiff.

McClung, contra.

COLLIER, C. J. The charge of the court supposes that a rescission of the contract was permissible without an actual return of the deed as provided by the agreement; and even by a loss of the deed and notice thereof to the plaintiff, previous to the first day of October, 1833. For the purpose of ascertaining what was to be done by the defendant and Peters, to relieve themselves from their obligation to pay the plaintiff the sum stipulated, regard must be had to the terms of agreement. It nowhere declares that a mere loss of the deed, though the plaintiff be informed thereof, shall absolve them from their undertaking to pay. The court, then, in stating the law to the jury, erred in supposing the proof of these facts should have that effect.

The parties agreed that the contract should be null and void, if the defendant and Peters returned the deed made by Gamble (through his attorney), by the first day of October, 1833. In default of such return, they are to pay to the plaintiff five hundred dollars, on, etc. Here is an alternative agreement, either to perform a certain act or pay a sum of money, and is an express covenant to do one of two things—the omission to return the deed at the time appointed, makes absolute the undertaking to pay the money. And it is no answer to an action brought for the non-payment of the money, for the defendant to say, that I would have availed myself of its alternative, had not circumstances beyond my control prevented. To excuse

the performance of an express covenant, it must be shown, either that it is prohibited by law, or that its performance has become impossible by the intervention of causes which human agency could not prevent. To illustrate the latter excuse; if one rents a house which he stipulates to repair—if it be destroyed by lightning, he shall notwithstanding rebuild it; because this is possible. But if one rent land, and covenant to redeliver it to the landlord in as good a condition as when he received it; yet if the timber is prostrated by a tempest, he shall not be held to a performance; because the injury was a result beyond human prevention, and reparation impracticable. If, however, in the case last supposed, the tenant had suffered the fencing to be destroyed, and the fruit or ornamental trees to be injured by cattle, he would be responsible for the injury in damages.

In the case at bar, the defendant does not bring himself within the principle of the cases, which relieve from the performance of express covenants. The loss of the deed is not pretended to have been occasioned by any cause, which care and prudence could not have prevented, and we can not well conceive how it could have been lost, otherwise than from the want of carefulness. It has, however, been urged, that as the deed could subserve no purpose in the hands of the plaintiff, there could be no necessity for requiring its return before the rescission of the contract. Would not its retention place it in the power of the defendant to sell patent rights to the prejudice of the plaintiff's interests? Be this as it may, the parties themselves have provided the terms on which their contract shall be abrogated, and neither can dispense with them, without the consent of the other: *McGehee v. Hill*, 4 Port. 170 [29 Am. Dec. 277]; *Perry v. Hewlett*, 5 Id. 318.

But even if the charge of the court was unexceptionable, the evidence received in the court below, was clearly inadmissible. The bill of exceptions does not inform us whether the defendant's testimony was addressed to the court or the jury, but as the fact he related was necessary (if available) to be shown to the latter, we must infer that he gave evidence to the jury; more especially as it appears that there was no other evidence at all satisfactory to that point. The defendant did not propose to show the loss of the deed to the court, and thus lay the ground for the introduction of parol evidence of its contents. But the object of his testimony was to furnish an excuse for the neglect to return it to the plaintiff. That a party

who has had the custody of a paper, may, upon first proving its existence by a disinterested witness, give testimony to the court of its loss, that secondary evidence of its contents may be let in to the jury, is well settled, at least in this state: *Bass v. Brooks*, 1 Stew. 44. But no authority within the range of our researches maintains the competency of a party to become a witness in his own cause, as to facts material to be shown to the jury, either in the prosecution or defense of a cause. That this departure from the rules of evidence was tolerated in the present case, we are constrained to conclude.

The result of our inquiries is, that upon each of the points presented by the bill of exceptions, the circuit court erred.

The judgment is consequently reversed, and the cause remanded.

PERFORMANCE OF AN EXPRESS COVENANT will not be excused unless it has been rendered impossible by some act of God or inevitable accident, evidently not within the contemplation of the parties to the covenant: *Singleton v. Carroll*, 22 Am. Dec. 95. But in general not even inevitable accident will excuse the obligor: See same case, and *Stephens v. Vaughan*, 20 Id. 216; *Reid v. Edwards*, post.

GREENE v. LINTON.

[7 PORTER, 133.]

PART PERFORMANCE OF A CONTRACT OF SERVICE will entitle to compensation, where entire performance has been prevented by sickness.

THE REMEDY, WHERE THERE HAS BEEN PART PERFORMANCE of a contract of service, is upon the contract itself, and not upon a *quantum meruit*.

WHERE THERE HAS BEEN PART PERFORMANCE OF ONE OF TWO DEPENDENT COVENANTS the party sought to be charged upon his covenant on account of such part performance may reduce the damages by showing the loss that he has incurred on account of there not having been entire performance.

COVENANT. The opinion states the case.

Peck and Clark, for the plaintiff in error.

GOLDTHWAITE, J. The plaintiff instituted this action of covenant in the circuit court of Pickens county, and from his declaration, we are to ascertain the terms of the covenant between the parties. The defendants being desirous of carrying on the blacksmith's business in Pickensville, covenanted with the plaintiff, to give him one fourth part of the net proceeds arising from the business for the term of twelve months, commencing from the date of the covenant. The plaintiff, in consideration

of the bargain and agreement of the defendants, covenanted to carry on the said business for them, with due diligence, industry, and care, striving, at all times, to further the business, and promote their interest as much as possible.

These stipulations, with others, which are not material to be stated, are set forth in the declaration; which avers, that a number of slaves were placed under the direction of the plaintiff, who entered on the business of blacksmithing, and superintended and carried on the same for the defendants during the space of eight months, at the expiration of which period, he was taken sick, and was unable to perform any service or labor for the next four months. It is also averred, that during the eight months, one fourth part of the net proceeds of the business, amounted to one thousand dollars, which the plaintiff claims, by reason of the covenant, and his performance, for that period, of all which was required of him by his stipulations: and the declaration concludes with the averment, that the defendants have broken their covenant, by not paying him the said sum of money. Waiving, for the present, the consideration of the form of the declaration, it seems obvious, that the plaintiff has, on the facts presented, a strong claim to receive from the defendants, one fourth part of whatever sum was made from the business during the time he superintended it, and his misfortune ought not to deprive him of this claim; yet no little difficulty is experienced in ascertaining the true rule of law, applicable to cases of this description.

The covenants, as they are stated by the declaration, are mutual, and would seem to be dependent on each other; and if this rule is to obtain, the plaintiff must necessarily aver performance on his part, before he can be entitled to a recovery. This view is taken by the pleader in framing his declaration; but instead of averring performance of the services during the whole twelve months, he states as an excuse, that he was disabled by sickness during four of the months; and thus the question arises, as to the sufficiency of the declaration. If, by the contract of the parties, the plaintiff has stipulated, absolutely, that he will serve the defendants for twelve months, and the service for the whole time, is a condition to be performed, before he can be entitled to any compensation, there is an end of the case; because, by his own statement, he admits that during a portion of the time he did not render the services contemplated by the agreement.

The elder decisions on the subject of dependent and inde-

pendent covenants, are not to be reconciled with each other, and it would be useless to look to them for the rules by which we are to arrive at the proper construction which is to be given to the contract now before us. Modern cases, without attempting to lay down or prescribe fixed and arbitrary rules, admit that the construction is best arrived at by ascertaining the intention of the parties, and giving such construction as will best serve to carry it into effect: *Kingston v. Preston*, 2 Doug. 689; *Glazebrook v. Woodrow*, 8 T. R. 371; *Perry v. Hewlett*, 5 Port. 318. This being the rule, let us endeavor to ascertain from the covenants themselves, what was intended to be understood by the parties. It is evident that the contract was to continue for twelve months (and during that time, neither would have the right, without the consent of the other, to dissolve it), because the net proceeds, during that period, were to determine the amount of compensation to be received by the plaintiff. So, it is also evident, that the personal services of the plaintiff were to be rendered during the same period, for the purpose of increasing the sum to be divided at its expiration; otherwise, no reason can be assigned why he was employed at all. And it is clear, that neither party contemplated the sickness or death of the plaintiff; otherwise it is fair to presume that such events would have been provided against.

Now, it is apparent that manifest injustice would be done to the plaintiff, by inserting an implied consideration in this contract, that he should continue in health during each day of the whole year, and to make his compensation depend on the performance of this condition. So, it would be equally unjust to the defendants to compel them to pay the plaintiff for the whole year, when he may have been incapacitated by disease during eleven months of it. As neither party ought to be injured by that which was never contemplated by them when they entered into the covenant, some rule must be ascertained which will render equal justice to all concerned. If the contract is to be considered as rescinded, and that the plaintiff is entitled to a reasonable remuneration for his services, each party might have reason to complain. The defendants might allege, that they had only contracted to pay one fourth of the profits, and none might have been made. The plaintiff might insist, that the profits, during the time he had rendered the services, were much more than his compensation as a laborer would amount to. The rescission of the contract would not, therefore, indicate the true rule.

If the plaintiff should insist (as he does by his declaration) that he is entitled to receive his proportion of the profits made during the time he rendered the services, the defendants might well reply, that the business for the other part of the year had been unprofitable, and involved them in debt—when it was but equitable, that the profits of the first eight months should discharge the losses of the last four: or they might insist that their reasonable profits to have been expected, were much lessened by the illness of the plaintiff, and that they were entitled to receive from the former fund, a remuneration for the profits which would have accrued to them.

A principle of decision has obtained in cases where there are mutual covenants, and a part performance has been made, which, if applied here, will, we think, afford the means of arriving at a rule agreeable alike to equity and law. The case of *Boone v. Eyre*, 1 H. Bl. 273, was a case of mutual covenants. The plaintiff conveyed to the defendant, the equity of redemption of a West India plantation, together with a stock of negroes on it, in consideration of five hundred pounds, and an annuity of one hundred and sixty pounds for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy; and the defendant covenanted that the plaintiff, well and truly performing all and everything therein contained, on his part to be performed, he, the defendant, would pay the annuity. The breach assigned, was the non-payment of the annuity—plea, that the plaintiff was not at the time of making the deed, legally possessed of the slaves or the plantation, and so had not a good title to convey—to which there was a general demurrer. Lord Mansfield held, that as the covenants in relation to the slaves went only to a part of the consideration, and as the breach of covenant would be paid for in damages, the plea was not good; and if it were allowed, any negro not being the property of the plaintiff, would bar the action.

So, in the case now before us, if the performance of the services by the plaintiff is a condition, the failure for one day would be as fatal as a failure for months.

In *Campbell v. Jones*, 6 T. R. 570, Mr. Justice Ashurst, after adverting to the case of *Boone v. Eyre*, says there is a difference between executed and executory covenants: and that there the covenants were executed in part, and the defendant ought not to keep the estate, because the plaintiff had not a title to a few negroes. Apply this remark to this case. Here is a

covenant which is to be executed on each one of three hundred and sixty-five days—there is a failure as to some of the days, but a performance on the others. Ought the plaintiff to be defeated of his remedy? We think not. The rule which we have adverted to, is now well established and settled in all the English courts: *Carpenter v. Cresswell*, 4 Bing. 409; 8 Taunt. 583;¹ 2 J. B. Moore, 639;² and its intrinsic merit must cause its adoption everywhere. But in these cases, it does not seem to have occurred to the courts, that there was no necessity of throwing the defendant on his cross action, on the covenants to him, which would often be productive of evil consequences, as in the case of an insolvent, or doubtfully solvent, plaintiff.

In the action of covenant, damages, and not a sum *in numero* are recoverable, and although a sum certain may often afford the proper measure of damages, yet it by no means follows, that it is the only measure. If, then, where an action is brought by one party, when the covenants are mutual, and have been performed in part only by the plaintiff, and the defense does not go to the whole consideration, it will be a much safer rule to permit the defendant to reduce the damages, by showing those which he has sustained by the failure of the plaintiff. This course would harmonize with other decisions of this court, permitting a partial failure of consideration to be given in evidence in an action on the original contract; and as in many, and perhaps most of the cases of mutual covenants, those of one party form the consideration for the covenants entered into by the other, justice would be much promoted by allowing the reduction of the damages claimed, instead of compelling the defendant to resort to his cross action, whenever there is shown a partial performance of the covenants.

We are aware that we have gone further into the consideration of this subject, than is perhaps warranted by the case before us, but as many of these questions have been adverted to in argument, and as an exposition of the rule seemed to be called for, in order that our present decision may be understood, we have gone at length into the principle which we think governs such cases.

To apply the principles we have thus ascertained, to the decision of the case before us: It will be seen that the declaration is defective, as it assumes, as a consequence of the inability of the plaintiff to render the services contemplated by the contract, for the last four months of the year, that the mode of

1. *Fethergill v. Walton*.

2. S. C.

ascertaining his compensation was changed. The contract of the parties is, that one fourth part of the net proceeds for the year is to be paid. The plaintiff assumes that he is entitled, under the circumstances, to one fourth of the net proceeds for eight months.

In this view alone, the declaration is defective, as the matters which are set out do not impair the essential features of the contract; but as this error in the declaration is sufficient to sustain the judgment of the circuit court, it must be affirmed.

QUANTUM MERUIT is in general considered the proper remedy, where the law gives any remedy at all, in cases of part performance of an entire contract: *Helm v. Wilson*, 28 Am. Dec. 336 and note.

ROSSER v. RANDOLPH.

[7 PORTER, 238.]

BILL TO ENJOIN A PUBLIC NUISANCE lies at the instance of a private individual who is injuriously affected thereby.

INJUNCTION AGAINST A NUISANCE will be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or invasion of a legal right. Thus, where the erection of a mill will cause the overflow of a spring from which plaintiff obtains his drinking water, an injunction will not be granted where it does not appear but that water might be obtained elsewhere, and where it does appear that by a slight expenditure of time and labor the spring could be protected from overflow.

CHANCERY WILL RARELY ENJOIN A NUISANCE prior to a trial at law wherein the nuisance is established.

BILL in equity. The opinion states the case.

Crabb and Porter, for the plaintiff.

Ellis and Peck, contra.

ORMOND, J. It was made a question at the bar, whether a bill could be filed by an individual to enjoin a nuisance, which, although it might affect him, was also public in its character; and whether the proper mode of proceeding, was not by information.

Although in the case of *The Attorney-general v. The Utica Insurance Company*, 2 Johns. Ch. 371, this right is doubted by Chancellor Kent, and was formerly doubted in England, the question appears to be settled by the recent English decisions, and was so determined by this court, in the case of *The State ex*

rel. the Mayor and Alderman of Mobile, 5 Port. 279.¹ Notwithstanding the power of the chancellor to interfere by injunction, in the case of a private nuisance, is unquestionable—yet, it must be admitted, that the control thus exercised over an individual, in the use or enjoyment of his property, is one of the transcendent powers of the court of chancery—a power necessary to be vested in the court for the security of all, but which should be cautiously and sparingly exercised.

It is difficult, if not impossible, to define, in advance, all the cases in which the court would be authorized thus to interfere; but it may be safely laid down as applicable to this class of cases, that it must be satisfactorily shown, that the proposed erection would inflict an irreparable injury, such an one as could not be adequately compensated in damages; or it must threaten materially to impair the comfort or the existence of those living near it, to entitle those aggrieved to the aid of the preventive justice of the law. But a clear and plain case must be made out. Both in England and the United States, the court of chancery is exceedingly unwilling to interfere by injunction, until the nuisance has been established by a trial at law.

In the case of *Van Bergen v. Van Bergen*, 3 Johns. Ch. 287 [8 Am. Dec. 511], Chancellor Kent thus states the law: “The cases in which chancery has interfered by injunction to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other had long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this court.” Again, in the same case, quoting the opinion of Lord Eldon with approbation, he puts the jurisdiction of the court upon the ground “of material injury, and of that special and troublesome mischief which required a preventive remedy, as well as a compensation in damages.” To the same effect is the case of *Wingfield v. Crenshaw*, 4 Hen. & M. 474. With this sound and lucid exposition of the law we entirely agree, and will now proceed to apply its principles to this case.

The allegations of the bill, material to be stated, are, that the defendant was about erecting a mill near the dwelling of the complainant, and that the health of his family, and that of the neighborhood generally, would be thereby endangered—also,

1. *State v. Mayor etc. of Mobile*; S. C., 30 Am. Dec. 504.

that the flow of water from the mill, while in operation, would drown and render valueless a spring on which he relied to furnish himself and his family with pure water. That the defendant had not procured an order of court, authorizing him to erect the mill, and prays an injunction. The injunction was granted, in the first instance, but the defendant, in defiance thereof, proceeded to build his mill, and put it in operation. Its effects on the health of the complainant's family, and on his spring of water, are therefore susceptible of proof.

Many witnesses have been examined, but it does not appear from the testimony, that the health of the complainant's family has suffered by the erection of the mill. But it appears very conclusively, that whilst the mill is in operation, the spring of the complainant is overflowed by the rush of water about two feet, and continues so some short time after the mill stops; and that the water of the spring is injured by the overflow of the creek, after it has subsided, from the sediment which is deposited. It also appears from the testimony, that by digging a ditch two hundred and fifty yards long, the spring will be protected from the overflow of the creek.

It was decided at the present term of this court, in the case of *Hendricks v. Johnson*, 6 Port. 472, that the legislative provision, on the subject of the erection of mills and other water-works, did not affect the common law right of the citizen. That any person has, without application to the judge of the county court, the right to erect a mill on a stream of water running through his land. This right he must exercise at his peril, and in such a manner as not to affect the rights of others.

The question, here, is not whether complainant is injured by the erection of the defendant's mill; but whether the injury is of such a character as to entitle him to the interposition of a court of chancery. If, by the erection of the defendant's mill, the complainant was deprived of the use of his spring of water, and water of as good quality could not be procured by digging in its neighborhood, or the overflow from the creek obviated by a reasonable amount of labor, the jurisdiction of the court of chancery would be complete—as no adequate compensation could be made for the privation of such an important element of existence as water; and no one should be allowed to use his property in a manner so prejudicial to his neighbor.

The spring appears to be situated almost in the bed of the creek, so that the smallest flood in the creek renders it useless. It however appears from the testimony, that by digging a ditch

two hundred and fifty yards long, and some of the witnesses add, by making an embankment, the spring will be protected from the rise in the creek, caused by working the mill—and it does not appear but that a well could easily be had in its neighborhood. This being the case, we do not see on what principle the jurisdiction of a court of chancery can be sustained. By the application of labor, the value of which can be ascertained, or which the defendant, if applied to, might be willing himself to do, the spring can be restored to its original state; thereby giving to complainant the full enjoyment of his spring of water, and at the same time securing to the defendant those rights which appertain to him as owner of the adjacent land. A court of chancery will not interfere in this extraordinary manner, to sustain or enforce even a right capriciously insisted on.

It does not follow, that because the erection of the mill is a nuisance, for which the complainant may have an action on the case, that therefore he is entitled to the interposition of a court of chancery: *Attorney-general v. Nichol*, 16 Ves. jun. 338. As already stated, to call into exercise the extraordinary power of the court, “there must be a strong and mischievous case of pressing necessity.” This does not seem to be one of these cases, but is one in which a court of law can afford full and adequate relief.

The decree of the court below is affirmed, at the cost of the complainant in the court below and in this court.

EQUITY WILL NOT INTERFERE TO ABATE A NUISANCE, erected to the disturbance of a private right, unless the right has been long previously enjoyed, and unless the necessity for interference is strong and urgent, or the right has been established at law: *Van Bergen v. Van Bergen*, 8 Am. Dec. 511. It was said in *Del. & Md. R. R. Co. v. Stump*, 29 Id. 561, in contradiction of the principal case, that the remedy by injunction was not applicable at the suit of private individuals, to the redress of public grievances.

GILLASPIE v. WESSON.

[7 PORTER, 454.]

DECLARATION WHICH DISCONTINUES THE SUIT against such defendants in the original writ as have not been served with process, is not demurrable, if the case it states could be sustained by proof of such a case as under the statute would authorize the discontinuance.

OFFICERS OF THE MILITIA CALLED INTO ACTIVE SERVICE, upon requisition of the general government, have not authority to bind the United States

by their purchase of supplies that they deem necessary, or even indispensable, for their troops.

AGENT IS PERSONALLY LIABLE UPON HIS CONTRACTS, as such, unless he can show authority to bind his principal.

DEBT. The opinion states the case.

Hopkins, for the plaintiffs in error.

COLLIER, C. J. The defendant in error caused to be issued, a writ, in debt, against the plaintiffs and William W. Garrard, returnable to the circuit court of Lauderdale. The writ was executed on the plaintiffs, and returned not found, as to Garrard. In his declaration, the defendant, reciting that process had not been executed on Garrard, as to him, discontinued his action, and declared against the plaintiffs in three counts. In the first two, the cause of action is stated to be a "written undertaking," entered into on the twenty-fourth day of May, 1836, by which the plaintiffs and Garrard promised to pay the defendant, by the twenty-fifth day of December next thereafter, the sum of seventy-five dollars, in consideration of a horse sold the former by the latter.

The third count charged the plaintiffs, together with Garrard, of having purchased from the defendant, on the — day of —, 1836, a horse, at the price of seventy-five dollars, to be paid on the twenty-fifth day of December next thereafter.

The plaintiffs in error pleaded: 1. *Nil debet*. 2. A special plea, in which it is circumstantially alleged, that the executive of Alabama, did, on the sixteenth day of May, 1836, make a requisition on Major-general Patterson, for — companies of mounted infantry, to act against the hostile Indians belonging to the Creek tribe, with the least possible delay. That to enable a compliance with the requisition of the executive, Major-general Patterson, did, on the — day of the same month, by his written order, directed to Brigadier-general Garrard (commanding the second brigade of his division), by which he required him to furnish, so soon as practicable, two companies of mounted infantry, for the purpose designated in the order of the executive. And that in raising the quota of mounted men required of the second brigade, it was absolutely necessary to purchase some horses. To meet that emergency, and for no other cause, the plaintiffs, with Garrard, as officers of that brigade, did purchase the defendant's horse, and gave him a certificate of purchase. The plea then concludes with a verification.

To the second plea, there was a demurrer, which being sustained, the case went to the jury on an issue to the first, and a verdict was found for the defendant in error.

On the trial, a bill of exceptions was taken by the plaintiffs in error, from which it appears, that the only evidence offered, was a writing of the following tenor:

“BRIGADE HEAD-QUARTERS, Florence, 24th May, 1836.

“We have purchased of Claibourne W. Wesson, one horse, at the price of seventy-five dollars, which horse we have purchased on account of the United States, for volunteers now ordered to the Creek nation, as mounted infantry, from the second brigade of the militia of Alabama, to act against the hostile Creek Indians—said sum to be paid by the twenty-fifth day of December next.

W. W. GARRARD,

Brig.-Gen. Second Brigade.

J. W. GILLASPIE, Col. Com.

MICHAEL WALDROP, Capt.

J. W. POWERS, Lieut.”

The admission of this evidence was objected to by the plaintiffs in error, but allowed to be read to the jury. The court being moved to instruct the jury, that upon the testimony, they must find for the plaintiffs in error, refused to do so, and instructed the jury, that the “writing sued upon was sufficient to charge them personally.”

Two questions have been made for the plaintiffs: 1. Is not the declaration defective, and should not the demurrer to the second plea have been visited upon it? 2. Does the declaration or the written evidence read to the jury, disclose a personal liability by the plaintiffs in error?

1. Each count contains a sufficient cause of action. It is, however, insisted, that as the third count set forth a liability not embraced by the statute, which authorizes a discontinuance against a defendant not served with process, the defendant in error, by ceasing to prosecute his suit as to Garrard, discontinued the action as to the plaintiffs. The statute referred to is as follows: “Whenever a writ shall issue against any two or more joint and several obligors, covenantors, or drawers, of any such bond, covenant, bill, or promissory note, or against two or more of the defendants to any such joint judgment, it shall be lawful for the plaintiff or his attorney, at any time after the return of said writ or an *alias* writ, to discontinue such action against any one or more of the defendants, on whom such writ or

alias writ shall not have been executed, and proceed to judgment against any one or more of said defendants, on whom said writ shall have been executed, or proceed to issue an *alias* or *pluries* writ, at his election."

It will be observed, that the writ in the case before us (as appears by its indorsement), issued against the plaintiffs and Garrard, as the joint makers or "drawers" of a "promissory note." The statute does not require that the declaration should make a literal disclosure of the cause of action, as it may be shown by the indorsement on the writ, or the proof given at the trial. It is quite enough, if the cause of action appear from the writ to be such as the statute designates, and the declaration be such as to admit it in evidence. If process issue, in *assumpsit*, upon a note, against the maker, a declaration for money had and received, etc., would be sustained by the introduction of the note. So, in the case before us, the third count might be made out by the evidence that was offered. There was, then, no error in not sustaining the demurrer to the declaration.

2. Taking, as strictly true, everything stated in the paper read to the jury, and there is no pretense for saying that the plaintiffs were government agents. Conceding that the first of the promisors was a brigadier-general of the second brigade of the militia of the state—the second, a colonel—the third, a captain, and the fourth, a lieutenant; that the second brigade had its headquarters at Florence; that the purchase of the horse was made on account of the United States, for volunteers ordered, as mounted infantry, to be marched to the Creek nation, to operate against the hostile Creek Indians; and yet it will not appear that the plaintiffs contracted as agents, or that the defendant was to look alone to the justice of the government for pay. It is well known that the organization of the army of the United States does not permit the militia officers of a state, upon a requisition for troops from the war department, to purchase such supplies as they may deem proper, or even indispensable. The only duty devolving upon them in such an emergency is, to comply with the order making the requisition, either by accepting volunteers, or making a draft, where a sufficient number can not be found willing to offer their services. When the troops thus raised are placed under the control of the militia officers of the federal government, then, and not sooner, does the duty and authority of an officer of supplies, acting under that government, directly commence.

In order to relieve a person, assuming to act as an agent, from personal responsibility, it is necessary that he should have been authorized to act, and that the credit should have been given to the principal; and there is no difference between the agent of an individual and the government: *Dusenbury v. Ellis*, 3 Johns. Cas. 70 [2 Am. Dec. 144]; *Perkins v. The Washington Insurance Company*, 4 Cow. 659; see also, 15 Johns. 1;¹ 3 Cai. 69;² 1 Cow. 513;³ 12 Johns. 444;⁴ 1 Cranch, 345.⁵ So, if a person undertakes to contract, as an agent, and so contracts as to impose no legal obligation upon his principal, he, himself, is personally responsible: *Mott v. Hicks*, 1 Cow. 513 [13 Am. Dec. 550]; Sutherland's opinion, and cases cited by him.

But, if the plaintiffs did not intend to assume a personal liability, why do they stipulate with the defendant, that "said sum (is) to be paid by the twenty-fifth of December next"? No appropriation had then be made to defray the expenses of the Creek campaign; and it was quite uncertain whether any would be made by the day the defendant was to be paid. In view of this circumstance, as well as an absence of all proof showing the plaintiffs' authority, we are constrained to consider their signatures as officers of the militia, as merely a *descriptio personarum*.

In *Taft v. Brewster*, 9 Johns. 334 [6 Am. Dec. 280], the defendants executed a bond by the style of the "Trustees of the Baptist society of the town of Richfield." The court held, that the bond was given in their individual capacities; and that the addition of trustees, etc., was a mere description of the persons: See also *Thacher v. Dinsmore*, 5 Mass. 299 [4 Am. Dec. 61]; *Foster v. Fielder*,⁶ 6 Id. 58; *Wilks et al. v. Back*, 2 East, 142; *White v. Cuyler*, 6 T. R. 176.

Again: we think it clear, from an examination of the authorities, that an agent, when sued upon a contract made by himself, can only exonerate himself from personal liability, by showing his authority to bind those for whom he has undertaken. It is not for the plaintiff to show his want of authority by proof—by the contract, the defendant has affirmed it, and it is incumbent upon him, according to a well-settled rule, to prove it: 1 Cow. 536, by Sutherland, J.

The facts disclosed in the special plea, do not, according to the principles we have laid down, constitute any available

1. *Rathbone v. Budlong*.2. *Sheffield v. Watson*.3. *Mott v. Hicks*.4. *Walker v. Swartwout*; 8. C., 7 Am. Dec. 334.5. *Hodgson v. Dexter*.6. *Forster v. Fuller*; 8. C., 4 Am. Dec. 87.

answer to the action; and the contract imposing a personal charge on the plaintiff, the demurrer was rightfully sustained.

The result of our opinion is, that the proceedings in the circuit court are regular, and its judgment must be affirmed.

AGENT IS PERSONALLY LIABLE upon his contracts unless he can show his authority to bind his principal: *Collins v. Allen*, 27 Am. Dec. 130 and note.

REID *v.* EDWARDS.

[7 PORTER, 508.]

LEGALITY OF A CONTRACT SET OUT IN A DECLARATION is not open to revision, if defendant has failed to demur.

PERFORMANCE OF AN EXPRESS COVENANT IS NOT EXCUSED by the fact that subsequent lawful acts of third persons have rendered it impossible. Thus, where a sheriff who has seized property of an execution debtor, in the hands of a third person, agrees with the latter that he will give him possession of the property on his paying the amount of the execution, the sheriff is not excused by the fact that the levy of subsequent executions upon the property, has rendered it impossible for him to deliver possession.

ASSUMPSIT. The general issue was pleaded. The defendant below (plaintiff here), a deputy sheriff, had seized under a *fi. fa.*, issued against Thomas W. Edwards, a slave in plaintiff's possession. After the seizure, it was agreed between plaintiff and defendant, that defendant should deliver possession of the slave to plaintiff, upon payment by the latter of the amount of the execution. Plaintiff then paid the said amount, but defendant, upon his part, was prevented from executing his part of the agreement, by the fact that the sheriff, in whose possession the slave was, refused to let him have it, because of the levy thereon of subsequent executions against Thomas W. Edwards. The jury was instructed, that the levy of these executions constituted no defense.

Peck, for the plaintiff in error.

Parsons, *contra*.

COLLIER, C. J. The arguments at the bar have presented this case to the court, as if the legality of the contract disclosed in the first count of the declaration, was now open for revision. A slight examination of the state of the pleadings would doubtless have convinced the counsel that they were laboring under a misapprehension. Had the plaintiff desired to avail himself

of the invalidity of that contract, his course was plain—he had only to demur to that part of the declaration. But instead of doing this, he has by his plea, tendered an issue of fact to the entire declaration, and on this issue, was the case tried in the circuit court. It is clearly competent for a party to admit the legal sufficiency of the cause of action with which he is charged by the pleading, and only put his adversary upon proof of its existence in point of fact.

The first count set forth the cause of action as it was proved at the trial, and if it did not show a liability, the plaintiff should have demurred to that count, unless he was unwilling to avail himself of a legal advantage. His omission to except to the declaration in the circuit court, precludes objection here. If injustice has been done him, the fault is not in the law, but in himself, in not presenting his defense in such a form as to authorize its consideration.

It will follow, from what we have said, that the charge of the circuit court was correct, so far as it assumes the right of the defendant in error to recover, if he has paid the sum of money which he stipulated with the plaintiff to pay him: the payment of the money was the only act to be done by the plaintiff. So that the court merely determined, if the defendant had performed his part of the contract, under the state of the pleading, the plaintiff was responsible to him in damages. It is, however, argued, that the charge to the jury is erroneous, in supposing that the subsequent levy by the sheriff afforded no excuse for the non-performance of the plaintiff's contract. The rules for the construction of contracts, whether verbal, written, or under seal, are the same. All contracts are to be performed according to their legal interpretation, and where a party undertakes expressly for the performance of some act, his positive engagement casts upon him a duty, the discharge of which can not be excused, by showing his inability, by reason of the lawful interference of some third person: See Chit. Con. 272, 273. By neglecting to qualify his contract, so as to make such an excuse available, he waives it as a defense against a recovery of damages for non-performance. This point we understand to have been in effect determined in *Perry v. Hewlett*, 5 Port. 318.

It is needless to consider what (under a proper state of case) would be the effect of the payment of the money by the plaintiff, to the execution creditor, as the question was not raised below, and it does not appear when the payment was made, whether before or after suit brought. Considering the case

only as it is presented by the pleadings, and not as it might possibly have been presented, we think there is no error in the instruction given to the jury.

The judgment is consequently affirmed.

What will excuse performance of an express covenant: *Morrow v. Campbell*, ante, 704.

KIRKSEY v. BATES.

[7 PORTER, 529.]

WHERE A STATUTE CREATES AN OFFICE PREVIOUSLY KNOWN TO THE COMMON LAW, reference must be had to that law for the purpose of ascertaining the officer's duties and the manner in which they are to be performed, in the absence of legislation establishing another rule.

A NOTARY PUBLIC is an officer known to the common law.

SEALS.—NOTARIES PUBLIC WERE AUTHORIZED at common law to provide their own seals.

NOTARY PUBLIC MAY PROVIDE HIS OWN SEAL, notwithstanding a statute which enacts that notarial seals shall bear the arms of the state, where the legislature has failed to provide what shall be the arms of the state.

ASSUMPTION on a bill of exchange. It was objected, on the trial, that the notarial seal appended to the protest was insufficient to establish it, for the reason that said seal did not bear the impress of the arms of the state, and further, because instead of bearing the name of the notary, it contained only his initials. The objection was overruled. Verdict and judgment went for plaintiff.

Street and Thornton, for the plaintiff in error.

Erwin, contra.

COLLIER, C. J. By the act of 1803, entitled "An act concerning notaries public," Aik. Dig. 326, the governor is invested with power to appoint a competent number of notaries public, of persons resident within the then territory, not to exceed in number more than two, to reside in any one county. The notaries thus appointed, are authorized to administer oaths or affirmations according to law, in all matters belonging or incident to their notarial office—to receive proof or acknowledgment of all instruments of writing relating to commerce or navigation—such as bills of sale, bottomries, mortgages, and hypothecations of ships, vessels, or boats, charter parties of affreightment, letters of attorney, and such other writings as are commonly proved or acknowledged before notaries within

the United States; and also to make declarations, and testify the truth thereof under their seal of office, concerning all matters by them done in their respective offices.

The act, then, after providing for the registry of the official acts of notaries, the certification of copies, and the deposit and safe-keeping of their registers upon the death of a notary, proceeds as follows: "Every notary shall provide a public notarial seal, with which he shall authenticate all his acts, instruments, and attestations; on which seal shall be engraved the arms of this territory, and shall have for legend, the name, surname, and office of the notary using the same, and the place of his residence." The remaining section merely prescribes the oath to be taken, and the bond to be executed by a notary. The act of 1814, authorizes a justice of the peace to discharge the duties of a notary public, where he is absent or incapable of acting. The act of 1819 provides an oath and bond for notaries, and changes the mode of their appointment, so that now the judge of the county court, and any two of the commissioners of revenue and roads, shall recommend to the governor a proper number of persons to act as notaries public in their county, whose duty it shall be to commission the persons recommended: Toul. Dig. 676; Aik. Dig. 86, 326, 327. These are the only statutes in regard to the appointment and qualification of notaries.

A notary public is an officer long known to the civil law, and designated as *registrarius*, *actuarius*, or *scrivarius*. Anciently, he was a scribe, who only took notes or minutes, and made short drafts of writings and instruments, both public and private. At this day, in most countries, a notary public is one who publicly attests deeds or writings, to make them authentic in another country; but principally in business relating to merchants. In England, several statutes have at different periods been enacted, regulating the appointment of that officer, and to some extent defining his duties: 41 Geo. III., c. 79; 3 and 4 Wm. IV., c. 70. But none of these statutes prescribe the particular seal to be employed by a notary, so far as we have been able to ascertain their terms.

A notary public, it has been said, is an officer known to the law of nations; hence his official acts receive credence, not only in his own country, but in all others in which they are used as instruments of evidence. He is certainly recognized by the law merchant, and his acts, to some extent, are indispensable to its efficacy. As in the case of a foreign bill, a protest is necessary

to show its dishonor by the refusal of the drawee to accept or pay it, and can only be excused by proving, either that the drawer had no effects in the hands of the drawee, and no reasonable expectation that the bill would be honored, or that the drawer has waived its necessity by a promise to pay, under a knowledge of the circumstances: *Legge v. Thorpe*, 12 East, 171.

When a statute creates an office previously known to the common law, for the purpose of ascertaining the duties of the officer, and the manner in which they are to be exercised, reference must be had to that law in the absence of legislation. Let it be supposed, then, that the legislature had merely provided for the appointment and qualification of notaries public, without attempting to define their powers, or to declare how their acts were to be authenticated, and it can not be doubted that notarial acts would have been required to be done according to the forms used at the common law. Now, according to that law, a notary was required to provide his own seal, with such inscription as his judgment or fancy might dictate. But let us suppose farther, that the legislature have created such an office, and directed the officer to perform his duties in a particular manner, the practicability of which depends upon some act first to be done by that body, shall its omission deprive the officer of all authority? It is unnecessary to answer this question. For the legislature, in all its enactments since 1803, in regard to notaries, treats them as officers invested with all powers which ordinarily belong to their offices. And even as late as 1828, it was enacted, that "the protest of a notary public, which shall set forth a demand, refusal, non-acceptance, or non-payment of any inland bill of exchange, or other protestable security, for money or other thing, and that legal notice, expressing in the said protest, the time when given of such fact or facts, was personally, or through the post-office, given to any of the parties entitled by law to notice, shall be evidence of the facts it purports to contain, and entitle the holder of such security to the damages to which by law he may be entitled."

Why was this law enacted by the legislature, if it did not suppose that our notaries public were invested with all powers appertaining to their offices? Yet this could not be, if it were necessary to the validity of their acts, that they should be attested by such a seal as they are directed by the act of 1803, to provide. Our statute book does not inform us what device has been adopted to represent the arms of the territory of Mississippi or Alabama, or of this state; and the public acts of the

executive branch of the government (if competent to the task), are alike silent.

It is, however, argued for the plaintiff, that the inscription made upon the seal of the state, must be taken to be the arms of the state. Strange as it may seem, the only legal provision extant, in regard to a public seal in either of the territories to which we have referred, is to be found in an act of congress of 1792, in regard to the territory north-west of the river Ohio, which, by a subsequent act, was applied to the Mississippi and Alabama territories. The provision referred to is as follows: "The secretary of state shall provide proper seals for the several and respective public offices in the said territories:" Turn. Miss. Dig. 40, sec. 8. Here we discover no particular seal is prescribed, but a mere direction is given to provide a seal for each public office. By the twelfth section, fourth article of our constitution, it is ordained, that "there shall be a seal of this state, which shall be kept by the governor, and used by him officially; and the present seal of the territory shall be the seal of the state, until otherwise directed by the general assembly." This is all we can find in relation to a seal. What is represented by its impression, we are not informed, otherwise than by its inspection. By a public seal, we legally understand, an impression made of some device, by means of a piece of metal or other hard substance, kept and used by public authority. What that impression is, unless prescribed by law, or other public act, can not be known but in the way we have mentioned. Arms, in the sense in which they are used in the act of 1803, in regard to notarial seals, clearly mean the armorial ensigns of a state or political community, intended to distinguish it from others, which is usually transferred to its national flag or banner. Yet, perhaps, a public flag can not always be considered as a true indication of the arms of the country to which it belongs; for most countries have two banners—the one borne by vessels of war, and the other by those engaged in commerce.

In the days of chivalry and knight errantry, and at the present time, where distinctions are recognized by law, between wealth and other adventitious influences, and property or weakness, the adventurous and the great have adopted their insignia, suggested by valorous achievement, or other causes. These are called their arms or family escutcheon, and are usually engraved on their seals. Yet, does it follow, that by the mere adoption of a seal, to give solemnity or validity to contracts, the ensigns armorial of a family are also adopted, and that the device upon

the seal represents them? It is apprehended not. In respect to the legend, as the engraving directed by the act can not be made, the legend is, in our opinion, unnecessary.

Our conclusion, from the best examination we can give the question presented by the counsel at bar, is:

1. That a notary public is an officer known to the law merchant, and of consequence, to the common law, of which it is a part.

2. That notaries public were authorized, by that law, to provide their own seals.

3. That the creation of the office by statute, authorizes the officer to act in the form prescribed by the common law, as it was impossible for him to use the seal required by the legislature; the more especially as the right to perform notarial acts, has been recognized by several subsequent statutes.

And lastly—that the requisition of such a seal as the act of 1803 describes, must be considered to be obsolete, by an omission to declare what should be the arms of either of the territories or this state.

The consequence of which is that there is no error in the record, and the judgment is affirmed.

C A S E S
IN THE
SUPREME COURT
OF
A R K A N S A S.

DUGAN v. CURETON.

[1 ARKANSAS, 31.]

MISREPRESENTATION OF ADVANTAGES OF A PURCHASE, made to a buyer, by the seller, the latter being under no legal obligation to speak the truth in regard to the matter, can not form the basis of a suit either at law or in equity.

COURT OF EQUITY WILL GENERALLY RETAIN A CASE of which it has once taken jurisdiction, until it has disposed of the whole subject; but it will not retain a case where the bill does not allege any specific ground of equitable relief.

SET-OFF, WHAT CAN NOT BE MADE SUBJECT OF.—Uncertain damages arising on a breach of contract can not be made the subject of a set-off, either in a court of law or equity.

APPEAL from the Washington circuit court. The opinion states the case.

Taylor, for the appellant.

Walker and Fowler, for the appellees.

By Court, Ringo, C. J. The facts in the case, as set forth in the bill, are to the following effect: The appellant, having a quantity of merchandise in his store at Cane Hill, in Washington county, urged the appellees to purchase them, which at first they declined doing, on account of the assortment being broken and consisting of such articles as were unsalable; but the appellant representing to them the advantages which would result from the purchase, they finally consented, and agreed to give him his price for the goods, upon his assurance that he would go to the city of New Orleans the next spring, and procure and deliver to them in Washington county, three thousand

dollars' worth of such articles as would make their assortment complete when united with the remnants purchased of him: only charging them twelve and one half per cent. on the Orleans cost and carriage.

The appellees were farmers in Washington county, and had never traded to New Orleans, or any distant city where merchants supply themselves with goods; were unknown and had no credit abroad, and for the purpose of enabling themselves to set up business, acceded to the offers made them by the appellant, and did agree to give him his price for said remnant of goods, upon the express condition that he would purchase in New Orleans, and deliver the amount of goods aforesaid, to make their assortment complete; and thereupon executed to said appellant their three several notes in writing or writings obligatory; two for eight hundred dollars each, and one for seven hundred and eighty-six dollars, payable six months after date, and paid in hand some three or four hundred dollars, making in all about two thousand seven hundred dollars. At the time the notes were executed the appellees called witnesses to bear testimony that they were given upon the express condition that the appellant would make the assortment complete by the purchase of said goods in New Orleans.

The appellant, long before the notes became due, called on the appellees for all the money they could spare, and wrote to them requesting them to make out a bill of such goods as they wanted, stating that he was on the eve of starting to New Orleans, and wanted the money to aid in purchasing the goods. Whereupon they advanced him between four and six hundred dollars for that purpose, which was paid before said notes were due, and placed to their credit on them; and they have since paid him one hundred and fifty or two hundred dollars on said notes. The appellees, confiding in the honesty and integrity of the appellant, declined cultivating a farm to any extent, and gave their whole attention to the preparation for receiving and selling the said expected new assortment of goods to be furnished by the appellant, and to the sale of the remnants on hand bought of him as above mentioned.

The appellees repeatedly urged the appellant to purchase for them the goods promised, representing their dependent situation, and he as repeatedly promised to comply; but finally, late in the season, when the appellees had no possible chance of getting goods elsewhere, and when it was too late to raise a crop, informed them that he was not going to New Orleans, and could

not comply with his promise. Being thus left with the remnants of unsalable goods on hand, they devoted their whole attention to the sale of them, and were compelled to sell many on credit to any and every person who would buy, and were thereby forced to make many bad debts. That for cash or good credit, the articles were generally sold for less than they would have been if they had been assorted; and that many articles of cutlery, and remnants to a considerable amount, say three hundred dollars, were on hand and unsalable, and which they tender to be disposed of as the court may direct.

That, independent of their own time and expenses, the appellees have not made anything like cost out of said remnants, and that with the additional supply of goods promised by the appellant, with less labor and expense, they could have realized a very handsome profit, and sold the remnants much faster and to better advantage; and that but for the fraud and neglect of said appellant, they should have cleared one thousand dollars on the goods sold and those to have been purchased and delivered by him. That said appellant has sued and recovered a judgment at law against them, on said notes, for one thousand seven hundred and fifty dollars debt, and one hundred and forty-eight dollars and fourteen cents damages, and threatens to collect the same by execution. The bill prays an injunction, which was granted as to one thousand two hundred dollars of said judgment, and refused as to the residue.

The answer of the appellant denies positively all the equity and every material allegation of the bill; and insists that the goods sold by him to the appellees were, at the time of the sale, worth more at the wholesale prices in Washington county, than he sold them for to said appellees. No motion was made to dissolve the injunction: and although a motion for that purpose is copied in the transcript, it does not appear to have been noted of record, or in any manner noticed by the circuit court, and is not even indorsed as filed. We can not, therefore, consider it as any part of the record.

The cause appears to have been regularly set down for final hearing, on the bill, answer, exhibits, and depositions. Upon the hearing the court decided that the complainants relied upon unliquidated damages, if any, and therefore ordered that a jury come at the next term to inquire what damages the complainants had sustained, if any, and continued the cause. The record shows that at a subsequent term a jury was impaneled and sworn to inquire as to the loss and damage which the

complainants sustained by reason of preparations for merchandising, neglecting to cultivate their farms, and attend to the ordinary pursuits of farming, and the loss and damages which they sustained by reason of their not being furnished with three thousand dollars' worth of assorted goods at New Orleans prices, deducting twelve and one half per cent. upon cost and carriage, and a true verdict to render according to evidence. The first jury sworn disagreed, and a juror being withdrawn, a second jury was called and sworn as aforesaid, which assessed the appellees' damages by reason of the premises to one thousand five hundred dollars; and thereupon the circuit court proceeded to pronounce a final decree. That the injunction for one thousand two hundred dollars should be perpetual and absolute, and that the appellees should recover of the appellant three hundred dollars, the residue of the damages assessed as aforesaid, and have execution therefor; and that the appellant should pay the costs of suit.

To reverse which this appeal is prosecuted. Many errors have been assigned which it will not be necessary to notice. The eleventh, twelfth, thirteenth, and fourteenth may be considered together. The eleventh assignment asserts, that said circuit court took cognizance of a mere personal contract for the assessment of unliquidated damages, when (if any such contract existed) the said appellees had their full, complete, and adequate remedy at law. The twelfth assignment of error asserts that the circuit court exonerated said appellees from the payment of the purchase money for the goods mentioned in their bill, purchased by them from said appellant, without the contract of purchase having been rescinded by said appellees, or the goods returned to said appellant. The thirteenth assignment of error is substantially the same as the eleventh, asserting that the bill contained only matter cognizable in a court of law, without anything to give jurisdiction to a court of equity. The fourteenth assignment of error is general: that the decree is for the appellees, whereas it ought to have been for the appellant, and the bill dismissed.

It is contended on the part of the appellant, that a court of equity can exercise no jurisdiction in the case, because the appellees have full, complete, and adequate remedy at law. The several allegations of the bill have been reviewed, and it is contended that each of them is examinable at law, and ought to be decided in precisely the same manner in both courts. If, upon the sale of the remnants, it was a part of the original contract

that the appellant should furnish the appellees a stock of three thousand dollars' worth of goods the ensuing spring, to be purchased by him in New Orleans, and delivered in Washington county at twelve and one half per cent on New Orleans cost and carriage, his failure to supply the goods would subject him to an action at law in which the appellees might recover damages equal to the loss suffered by reason of his failure to perform the contract, and they could do no more in equity: but it would not be a ground for a rescission of the contract, either at law or equity.

If it was not part of the original contract, but merely an undertaking without consideration, no right accrued therefrom to the appellees either at law or in equity. If the contract, as stated in the bill, had been reduced to writing and duly executed and sealed by the appellant, the appellees might be compensated in damages in an action at law upon the breach, and could have nothing more in equity; and although the contract, covenant, or promise, might comprise a part of the consideration for the two thousand seven hundred dollars paid, or agreed to be paid, by the appellees to the appellant (as the appellees insist it does), still the undertakings, though mutual, would be independent, and a breach by either party would form the basis of an action at law in favor of the other party; but such breach could not alone constitute the ground of equity jurisdiction in favor of either party. The facts alleged are all examinable at law, and a court of law is as capable of deciding on them as a court of equity. In such case the existence of some fact which disables the party having the law in his favor from bringing his case fully and fairly before a court of law, has been generally supposed to be indispensable to the jurisdiction of a court of equity. Some defect of testimony, some disability, which a court of law can not remove, is usually alleged as a motive for coming into a court of equity. But in this case the bill alleges nothing which can prevent a court of law from exercising its full judgment. No defect of testimony is alleged, but it is shown by the bill that witnesses to the contract were called to bear testimony to it when it was entered into. No discovery is required, no insolvency intimated, or other cause stated why a recovery at law could not be obtained and made available. No accident suggested, no appeal made to the conscience of the appellant, and lastly, that there is no distinct ground of equity jurisdiction whatever set forth in the bill.

The argument on the other side is, that the appellees are

wholly without remedy at law: that they could make no legal defense to the action at law, because it was founded on writings obligatory: that the court of chancery has undoubted authority to enjoin the judgment at law, and when jurisdiction once attaches, the court will retain the case until all matters connected with it are settled, whether they would *per se* have been the subject of chancery jurisdiction or not. That all irregularities, not objected to in the court below, are to be considered by this court as waived. That this court is not at liberty to review any points in the cause which were not expressly decided by the circuit court: and lastly, that the bill expressly charges the appellant with fraud in the premises.

The allegation of fraud is not distinctly and positively made in the bill, but if it was so made, it is positively denied by the answer, and is not supported by the proof. It is not alleged that there was any misrepresentation or concealment on the part of the appellant, at or before the sale, either in relation to the quantity, quality, or description of the goods, and it is proved that they had been in the possession of the appellees for several months previous to the sale, and that they were placed in their possession to sell on commission. They therefore must have known the quantity, quality, and value of the goods as well, if not better, than the appellant. Consequently, there can be no pretense of fraud or imposition in the sale. And if the appellant did misrepresent the advantages to result to the appellees from the purchase, that was not a matter of which he was under any legal obligation to speak the truth, and however contrary to good faith and sound morals it may be, can not form the basis of any suit either at law or in equity. It has been repeatedly held that it is not every willful misrepresentation, even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it: for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort.

Story, in his treatise on equity jurisprudence, says: "To this class may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals, as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. In such cases the other party is bound, and indeed is understood to exercise his own judgment, if the matter is equally

open to the observation, examination, and skill of both. To such cases the maxim applies, *simplex commendatio non obligat*. The seller represents the qualities or value of the commodity and leaves them to the judgment of the buyer:" Story Eq. Jur. 208, 211. The same principle is stated in 2 Kent Com. 379.

In this case the appellees do not seek to rescind or avoid the contract of sale, but expressly affirm it, and ask a compensation in damages for the alleged breach of the contract on the part of the appellant, without showing any obstacle whatsoever to their recovery in a court of law, or even alleging that they will suffer a great or irreparable loss or injury by being obliged to resort to a court of law to recover their damages. The question of damages is purely legal, and if the appellees are warranted in coming into a court of chancery to have their unliquidated damages assessed and set off against the appellant's judgment at law, the like resort may be had to the courts of equity in every case of mutual and independent covenants, especially if one of the parties should sue and recover a judgment at law which the adverse party might pray the court to enjoin and set off with his damages sustained by reason of the breach of covenant or agreement in his favor, and thus the jurisdiction in that class of cases might be effectually taken from the courts of law and transferred to the courts of equity, contrary to what is understood to be the well-defined limits of the jurisdiction of courts of equity. And the attempt of the appellees to consider the failure of the appellant to keep and perform his contract or promise, as a fraud enabling the court of chancery to take jurisdiction of the subject for any purpose whatever, can not be sustained upon any principle recognized by courts of equity. It is said that the court had an undeniable right to grant the injunction; and having taken cognizance of the case for that purpose might retain it until all matters connected with it were settled. This position, as stated, is not strictly correct. The rule established by courts of equity is, that when they have once taken jurisdiction of a case for one purpose, they will generally retain the case until the whole subject is disposed of; but the primary and original object of the suit must be one clearly within its jurisdiction, and even then the court will not always retain the bill. In the case of *Graves and Earnewall v. The Boston Marine Insurance Company*,¹ the bill was filed to obtain relief against an alleged mistake by omitting

1. 2 Cranch, 419.

to insert the name of Barnewall in the policy, and also to charge the insurance company upon the policy of insurance effected by them. The answer denies that there was any mistake, and the evidence did not satisfactorily prove it. Upon the final hearing the court refused to reform the contract or grant the relief sought by the bill, and dismissed the bill upon the ground that Barnewall could have no relief on the policy either at law or in equity, and Graves had an adequate remedy at law on the policy to the extent of his interest; and the decree was affirmed in the supreme court of the United States: 1 Pet. Con. 435.

In that case the bill was retained solely upon the ground of the alleged mistake in the policy, until a final hearing, when that allegation not being sustained by the proof, the court refused to retain the suit for the purpose of charging the insurance company upon the policy—the remedy being complete at law—and for that cause alone the bill was dismissed.

In the case before us, no specific ground of equity is alleged in the bill; no accident or mistake is charged; no specific performance of any contract is sought to be enforced; no want of consideration is shown; no irreparable mischief or injury is to be prevented by the injunction; no peculiar hardship is shown to exist; no trust is to be enforced, or complicated accounts settled. The appellees have received the whole consideration for which they contracted. The stock received, together with the covenant or promise of the appellant to furnish an additional supply the ensuing spring, constituted the entire consideration for which they consented to pay two thousand seven hundred dollars. The appellant's undertaking was to be performed several months after the date of the contract, and the appellees relied solely upon his parol undertaking (an undertaking which, although materially varied by the answer, is substantially proved by the evidence), and if they failed to take from him a binding obligation or promise to perform the contract on his part, it was their own fault. There was no mistake, misrepresentation, or concealment about it; the contract is just what all the parties to it intended it should be; and if the appellant has failed to perform his part in the manner stipulated, it is nothing more than the ordinary breach of a contract to pay money, or to do, or refrain from doing, any other specified act, and can not, without some concurring equity, constitute a ground of relief in a court of equity. The appellees treat the promise of Dugan as binding upon him, thereby affirming the whole contract, and considering themselves dam-

nified by his breach of promise, pray an injunction, to restrain him from enforcing his judgment at law against them. This practice is without precedent, and is contrary to the well-established principle that uncertain damages arising on a breach of contract, can not be made the subject of a set-off, either in a court of law or equity. The authorities fully sustain these principles.

In the case of *Duncan v. Lyon*, 3 Johns. Ch. 357, 358 [8 Am. Dec. 513], which was a bill filed for the purpose of obtaining a discovery and set-off, as well as an injunction to stay the proceedings at law, in a suit founded on an agreement under seal, containing mutual covenants for the furnishing of timber, etc., by the complainant, which the defendant was to take to Montreal and Quebec, etc., and to pay the complainant half the proceeds, etc., and furnish an account, etc., an injunction was obtained, but not until an award had been made by arbitrators in favor of the plaintiff at law. Chancellor Kent, after saying that the bill was filed too late for a discovery, declares that "it is a settled principle, that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report, by facts, or on grounds of which he could not have availed himself, or was prevented from doing so by fraud or accident, or the acts of the opposite party, unmixed with negligence or fault on his part. This point has been so often ruled that it can not be necessary or expedient to discuss it again, and it is one by which I mean to be governed."

Having disposed of the case as to the discovery sought, he proceeds to examine the claim to set-off, and says: "The matters of account stated in the bill were not proper subjects of set-off in the action of covenant, and if the discovery had been obtained in season, I presume it would not have aided the defense. The breaches assigned in the action at law were, that the plaintiff had refused to perform his part of the covenant, in furnishing lumber and provisions, etc.; and the demand at law was in the nature of a redress for a wrong or injury committed, and not for a debt due. It rested entirely on uncertain and unliquidated damages. There can not be a set-off, even of a debt, against the demand of the plaintiff, unless that demand be of such a nature that it could be set off by a debt, if it existed, in him. There must be mutual debts: this is the settled doctrine in the courts of law. The same rule prevails, also, in courts of equity. The practice may perhaps be more liberal in respect to mutual credits, but there is no case in which a set-off

has been allowed, where the demand was for uncertain damages arising on a breach of covenant. The courts of law and equity follow the same general doctrine on the subject of set-off. If the recovery at law is to be taken under the present motion as a just recovery, then it would be unreasonable to delay the defendant until the accounts between the parties can be taken and stated, and the balance struck in this court. One judgment may be set off against another, but here is a demand on one side raised to a debt certain, by a legal assessment, and an uncertain claim on the other, depending on a settlement of accounts. These accounts were not the subject of set-off, and there is no case to warrant me to stay execution on the demand until the other is settled, and in a condition to be set off."

The principles asserted in that case are in point in this, and the promise being merely parol, can not vary the case. The damages are equally uncertain whether they arise upon the breach of a parol promise or covenant; and the uncertainty of the claim is the principal ground of its exclusion. The promise alleged is not for the payment of money, but for the performance of certain acts by the appellant, and the claim to damages results from his non-performance of those acts. This claim is as uncertain, at least, as if it rested upon a breach of covenant to perform the same acts. It is no debt due, and can not therefore be made the subject of set-off in either a court of law or equity. The court below decreed a set-off of one thousand two hundred dollars of the damages assessed by the jury, and a perpetual injunction against the appellant's judgment at law, and awarded execution against the appellant for three hundred dollars, the residue of said damages.

In pronouncing the decree, the circuit court expressly decided upon and in favor of the equity of the appellees' claim, as well as their right to enforce that claim in a court of chancery. And as the cause must be decided upon the ground of there being no equity upon the face of the bill and no facts therein to authorize or sustain the final decree pronounced in the cause, we deem it unnecessary to notice the other errors assigned, or to decide how far the court is at liberty to correct errors, which do not appear to have been expressly decided upon by the circuit court, or to declare under what circumstances the same will be considered as waived.

Wherefore, upon the reasons above stated, it is the opinion of this court that there is no equity in the bill of complainant, and that the circuit court, sitting as a court of chancery, erred

in granting relief thereupon to the appellees and perpetually enjoining the appellant from proceeding upon his judgment at law. The decree, therefore, must be reversed, annulled, and set aside, the injunction dissolved, with damages, according to law, and the bill dismissed with costs.

BILL MAY BE DISMISSED AT ANY TIME for want of equity, apparent on its face: *Haughy v. Strang*, 27 Am. Dec. 648; *Coleman v. Coleman*, 28 Id. 86; *Collins v. Jones*, 29 Id. 216.

FALSE REPRESENTATIONS OF VENDOR, WHEN DO NOT AVOID CONTRACT.— See *Williams v. Hicks*, 19 Am. Dec. 693, note 697.

UNLIQUIDATED DAMAGES ARE NOT SUBJECT OF SET-OFF: *Christian v. Miller*, 23 Am. Dec. 251, note 255; *Gogel v. Jacoby*, 9 Id. 339; *Duncan v. Lyon*, 8 Id. 513; *Livingston v. Livingston*, Id. 562.

The principal case is cited in *Bentley v. Dillard*, 6 Ark. 85, to the point that courts of equity will not relieve against judgments at law where the bill does not allege surprise, ignorance of important facts, nor equitable circumstances that have arisen since the trial.

TALLY v. REYNOLDS.

[1 ARKANSAS, 99.]

ATTORNEY MAY BE REQUIRED BY THE COURT TO SHOW HIS AUTHORITY to represent the party for whom he appears.

PARTY QUESTIONING ATTORNEY'S AUTHORITY must show, by affidavits, facts sufficient to raise a reasonable presumption that he is acting without authority.

MERE POSSESSION OF TRANSCRIPT OF JUDGMENT RAISES NO PRESUMPTION that the possessor has any interest therein sufficient to enable him to bring a suit thereon.

ATTORNEY WHOSE AUTHORITY IS QUESTIONED MUST SHOW that he has been employed by the party for whom he appears; and where there is no evidence of such employment, he will not be permitted to prosecute the suit.

ERROR to the Washington circuit court. The opinion states the case.

Walker and Fowler, for the plaintiff in error.

Cummins and Pike, for the defendant in error.

By Court, Ringo, C. J. This was an action of debt founded on a record of the circuit court of Lincoln county, in the state of Tennessee, brought in the name of the present plaintiff, against the defendant, in the Washington circuit court. The defendant appeared in the court below, and after filing a prayer of oyer of the record, and letters of administration mentioned in the declaration, on his affidavit then filed, obtained a rule

against the attorney prosecuting the suit, to show by what authority he prosecuted the same. The affidavit stated in substance that David Walker, the attorney prosecuting the suit, had no warrant or authority to prosecute this suit, as he verily believed; and that this belief was founded on the fact that the plaintiff is a resident of the state of Tennessee, and the papers were in the hands of A. J. Greer, and by him placed in the hands of said Walker, without the consent or knowledge of said Tally. On the return of the rule, the attorney prosecuting the suit, produced a witness who testified that whilst an attorney at law, he conversed with the plaintiff in this suit, relative to the solvency of the defendant, who resided in Arkansas, and his ability to pay said debt; that he responded to plaintiff that defendant was good. That he afterwards conversed with Fulton, an attorney in the original suit, about the collection of said debt; and after his arrival in Arkansas, he received a letter from — Holman, who said he had bought an interest in the judgment. He does not recollect which of these gentlemen gave him the record for collection which is the ground of action in this suit; but from circumstances infers that it must have been Fulton, as the plaintiff lived some distance from, and Fulton lived in town; that he brought said record from Tennessee, and placed it in the hands of David Walker, the attorney prosecuting this suit, for collection, and took the receipt of said Walker and A. J. Greer, for the collection of the same. Walker, the attorney prosecuting the suit, also testified that he conversed with the defendant long before this suit was brought, and showed him the record, and upon his refusing to pay, wrote to Tennessee and procured the letters of administration granted to the plaintiff. They were sent to him by Holman, who stated that he had an interest in the claim, and urged the collection thereof. Upon that evidence the court decided that the attorney had not shown any sufficient authority to prosecute the suit; and thereupon made the rule absolute, ordered the suit to be dismissed, and rendered judgment for costs in favor of the defendant, against the plaintiff.

The plaintiff excepted to the opinion of the court, and by his bill of exceptions spread the evidence on the record; and has brought the case before this court by writ of error. The assignment of error questions the decision of the court below:

1. That the affidavits of the defendant were sufficient in law to require the attorney to produce and show his authority to prosecute this suit; and 2. That the authority shown upon the rule

against the attorney was not sufficient to enable him to prosecute the suit. The right of the defendant to call upon the attorney representing the plaintiff to show his authority, does not appear to have been questioned; but its exercise was resisted on the ground solely, that the facts disclosed by the affidavits were not sufficient in law to authorize the interference of the court for that purpose. And the validity of this objection to the case shown by the affidavits, is the first question presented by the record, and made by the assignment of errors, for the decision of this court. The circumstances under which the authority of an attorney regularly licensed and duly admitted to practice in the courts, may be questioned, and the attorney required to produce his authority, do not appear to be very clearly defined, or very accurately stated in any of the authorities or books of practice to which we have been referred or had access. One general rule is, that the mere appearance of an attorney for the defendant is always deemed sufficient for the opposite party, and for the court; who will look no further, and will proceed as if he had sufficient authority, and leave any party who may be injured to his action, unless there appears to be fraud or collusion in the case. This rule appears to have been too long and authoritatively settled to be now disturbed. Under its influence the supreme court of the United States have decided that the non-appearance in the record of an authority to the attorney to prosecute or defend the suit was not error: *Osborn v. The Bank of the United States*, 9 Wheat. 738; 5 Pet. Cond. 752; and the supreme court of New-York, after a most elaborate examination of authorities, decided that the confession of judgment by an attorney, without any authority therefor from the defendant, was not irregular, and refused to set it aside, although the defendant's affidavit was positive that he had not in any manner, directly or indirectly confessed or authorized the confession of any judgment. The court, however, after it had ascertained and stated the rule, and admitted its authority, subjected it to such modifications as justice required, and leaving the judgment to stand as a security to the plaintiff, to save the defendant from injury, and prevent abuse in the practice, granted to the defendant leave to plead to the merits within a limited time, and during that time suspended the execution of the judgment; but in the default of such plea, the plaintiff was at liberty to proceed with his execution under said judgment: *Denton v. Noyes*, 6 Johns. 296 [5 Am. Dec. 237.]

The supreme court of Pennsylvania have acted on the same

principle in *McCullough v. Guefner*,¹ 1 Binn. 214; an attorney undertook to appear for a defendant not summoned, and without any warrant of attorney, and the court held the appearance good. In England, the court of king's bench, on the same ground compelled an attorney, who had, through misinformation, undertaken to appear for the defendant, without warrant or direction, to complete his appearance, so as to render the judgment which the plaintiff had taken by default, regular: *Lorymer v. Hollister*, 1 Stra. 693. Other authorities might be cited in which the same principle has been recognized and acted on in the United States as well as in England; most of which were examined, reviewed, and cited in the case of *Denton v. Noyes*, 6 Johns. 296 [5 Am. Dec. 237]. But however conclusively this general rule may have been established, it does not follow as a necessary consequence that a party may not, before judgment, upon a sufficient showing, to be adjudged of by the court, require the attorney representing his adversary to show his authority. This right is essential to the security of all suitors, and its existence can not be denied. In *Howe's Practice*, page 31, title Warrant of Attorney, it is said: "If the defendant suspects that the suit has been commenced without the authority of the plaintiff on the record, he may call on the plaintiff's attorney for proof of his authority." This right was elaborately discussed by the court of appeals of Kentucky, in the case of *McAlexander v. Wright*, 3 Mon. 189 [16 Am. Dec. 93]. And it was there decided that the defendant had such right, and upon a sufficient showing that his right was jeopardized, or that he was disturbed by being brought into litigation without the consent of the man who stood on the record as his adversary, he was entitled to its exercise. According to the rule settled by the court of appeals of Kentucky, it is incumbent on the party undertaking to question the authority of the attorney representing his adversary, to show to the court by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting in the case without authority from the party he assumes to represent; then, and not until then, the attorney may be required to show his authority.

In defining this rule, which we understand to have been the settled rule of practice in the courts of England and most, if not all, of our sister states, we would not be understood as imposing on the profession hardships in their management of suits, or deciding that they are bound to gratify the party to

1. *McCullough v. Guefner*.

which they are opposed with a sight of their authority upon light or frivolous grounds; but when substantial reasons are shown why the interest of the adverse party is jeopardized by the prosecution of suit without the leave or consent of the real owner of the demand, every reasonable person will agree that their authority ought to be shown.

The facts stated in the defendant's affidavits in this case, we think, were such as to entitle him to the rule against the attorney prosecuting the suit to show his authority. He shows that the record was placed in the hands of the attorney by A. J. Greer, without the consent or knowledge of the plaintiff, and that the plaintiff resided in Tennessee. These facts must be regarded as strong circumstances, tending directly to show that Tally had no hand in this suit; and for that reason the defendant might be in danger of another contest with him for the same demand. We will here remark that the facts shown in this case are just sufficient to raise a legitimate legal presumption against the attorney's authority; and if the facts that the record was placed in his hands by a third person, and not by the plaintiff, and without his consent or knowledge, had been less positively stated, the rule ought not to have been granted. In cases like the present, where the action is founded on the judgment of some court, a transcript of the record whereof may be procured at any time, and by any person who will pay the legal fees therefor, and suit be instituted in the name of the judgment-creditor, without his knowledge or consent, and the money coerced from the defendant without any authority whatever from the real owner of the demand; and because the mere possession of such transcript does not raise even a presumption that the possessor has any legal or beneficial interest in the judgment, the custody of which does not belong to the creditor, the rule should be made whenever it is shown that there is a reasonable probability that the suit is prosecuted without authority of the judgment-creditor, or other person really and beneficially interested in the judgment; but where the action is founded on any written obligation, the obligee has the legal custody of the instrument, and if any other has the possession of it the legal presumption is that he obtained it fairly and with the consent of the obligee; and this presumption stands, unless repelled by evidence: therefore, in such cases, stronger circumstances should be required to be shown than in the case of record, to induce the court to grant the rule against the attorney to show his authority. We have been referred to

the case of *Standifer v. Doulin for the use of McPhail*, decided by the supreme court of the late territory of Arkansas. In that case, as in this, an affidavit was filed by the defendant, denying that the attorney prosecuting the suit had any authority for that purpose. The affidavit there stated that the defendant was informed, and believed, that that suit had been instituted against him by John McPhail and his counsel, without any lawful authority from the plaintiff; and he had good reason to believe, that neither McPhail nor the attorney could execute a legal acquittance for the debt, if it should be paid to them. There was no statement of the facts or circumstances upon which the fears of the defendant were founded, and for that reason it was held insufficient to require the attorney to show his authority. The principle of that decision meets our approbation fully. The simple allegation of information and belief, without stating the facts upon which it is founded, however positively asserted, ought not, in our opinion, to be held sufficient. The facts themselves should be stated, to enable the court to determine how far they warrant the conclusions of the party. In the case before us, the facts are stated, and in that, this case differs from the case of *Standifer v. Doulin for the use of McPhail*.

We are, therefore, of the opinion that the affidavits filed in this case were, in law, sufficient; and that the court did not err in granting the rule thereupon.

The second question is, did the court err in deciding that the authority shown by the attorney representing the plaintiff was insufficient? The general right of an attorney regularly licensed and duly admitted to practice in courts, to appear for all the suitors in courts for whom he may be employed, is admitted. This right he has by virtue of his license and admission, and it is proved by the production of the license and the law under which it was granted; but it is not of itself an authority to appear as the representative of any particular person, until he is in fact employed or retained for that person. Then, and not until then, he becomes his attorney and representative, and is authorized to appear in his stead.

In the case before us, no warrant of attorney for the plaintiff was produced, nor any evidence whatsoever that he had retained or employed the attorney to prosecute this suit, or collect the demand in question. One witness (whose name is not even mentioned in the record), testifies that whilst an attorney at law, he conversed with the plaintiff relative to the defendant's solvency and ability to pay the debt, and informed him that the

defendant was good; and that he afterwards conversed with Fulton, who had been an attorney in the original suit about the collection of this debt. That one Holman afterwards informed him by letter that he had bought an interest in the judgment. He does not recollect who gave him the record, but infers that he received it from Fulton. He brought it from Tennessee, and placed it in the hands of Walker, the attorney prosecuting this suit, for collection; and took the receipt of Walker and A. J. Greer for its collection. Walker, himself, testified that he showed the record to the defendant, and conversed with him about it long before this suit was brought, and his refusal to pay: that he wrote to Tennessee, and obtained the plaintiff's letters of administration; which were sent to him by Holman, who stated he had an interest in the claim, and urged its collection.

From a careful examination of this testimony, it is apparent that the plaintiff has taken no part whatever in the present controversy: neither the transcript of the record nor letters of administration, appear to have been procured or sent by him; nor does he appear to have given any instruction about them, or to have been consulted in relation to the matter. No letters were written to or received from him. Once, indeed, he did converse with the witness about the defendant, and his ability to pay; but he is not shown to have done anything more. The witness does not pretend to have acted as his agent, or by or under his directions or authority, in bringing the transcript of the record from Tennessee to Arkansas, and placing it in the possession of Walker and Greer for collection. If he had acted as the agent of the plaintiff, why did he not say so? We can not believe that a point so important would have been silently or inadvertently passed without explanation, if the fact had been so: and his silence on that subject furnishes strong presumptive evidence that he did not act in that character. The evidence in regard to Holman's conduct in the matter, can not help the attorney; for although Holman appears to have corresponded with him and urged the collection of the claim, and at the same time claimed an interest in the judgment, yet he is not shown to have had, in fact, any interest whatever in the matter; and until that was shown by some right delivered from the plaintiff or his intestate, he could not be regarded as a person competent to confer the authority requisite to enable the attorney to prosecute this suit. We are

therefore of the opinion that the attorney representing the plaintiff did not show any competent legal authority to prosecute this suit, and there is no error in the decision of the court below.

The judgment of the circuit court is therefore affirmed with costs.

AUTHORITY OF ATTORNEY: See note to *McAlexander v. Wright*, 16 Am. Dec. 98, where this subject is discussed at some length; see also *Bell v. Wilson's Administrator*, 22 Id. 88.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

CROSBY v. FITCH.

[12 CONNECTICUT, 410.]

OWNERS OF A VESSEL TRANSPORTING GOODS FOR HIRE are common carriers, and are liable as such.

BILL OF LADING wherein the "dangers of the seas" are excepted does not limit or qualify the liability of ship-owners as common carriers.

ACT OF GOD, INEVITABLE ACCIDENT, dangers of the sea, etc., are expressions of very similar import, and excuse a loss, whether they are repeated in a bill of lading or not.

WHERE THE USUAL ROUTE OF VESSELS from New York to Norwich was through Long Island sound, the fact that navigation in the sound was obstructed by ice was held not to justify a vessel in departing from that route, and going upon the open sea to the south side of Long Island, but that such departure amounted to a deviation without reasonable necessity, and made the owners liable for a loss occasioned by dangers of the sea.

WHETHER THERE HAS BEEN A DEVIATION or not is, upon given facts, a question of law for the court to determine.

WHERE THE USUAL ROUTE for vessels bound from New York to Norwich is through Long Island sound, no usage for such vessels to perform their voyages on the south side of Long Island, when the navigation of the sound is obstructed by ice, will justify the master of a vessel bound on such a voyage in taking the latter course during such obstruction, instead of waiting in New York until the usual navigation becomes free, unless such usage is general, and of so long a standing as to have been generally known.

WHERE A PERSON WHO SHIPPED GOODS upon board of a vessel for transportation, upon being informed of the course of the voyage taken, effected an insurance of the goods shipped, and, after a loss, demanded payment of the policy, neither such insurance, nor demand of payment, is any evidence of the consent or acquiescence of the shipper in the course of the voyage.

ADMISSION OF IRRELEVANT TESTIMONY will not justify the granting of a new trial, if the fact sought to be proved by it was not controverted

ACTION upon the case to recover damages for the loss of fifty-two bales of cotton belonging to the plaintiffs, shipped on board the *Maria*, owned by defendants, at New York, to be transported to Norwich, Connecticut. A bill of lading was delivered to the plaintiffs for the goods shipped, signed by the master, in which "the dangers of the sea" were excepted. The facts necessary to an understanding of the points decided are sufficiently referred to in the opinion of the court. Verdict for the plaintiffs. Defendants moved for a new trial.

W. W. Ellsworth and T. Smith, for the motion.

Hungerford and T. C. Perkins, contra.

CHURCH, J. 1. The defendants have considered themselves as bailees for hire, and subject only to the responsibilities attachable to that character. If they are right in this, then a question of care and diligence, under the circumstances of the case, was one which ought by the judge at the trial to have been submitted to the jury. But if the defendants were common carriers, and liable for all losses not occasioned by the act of God, etc., then a very different question was to be settled.

We consider the defendants responsible in the latter character. They were owners of the coasting vessel *Maria*, a vessel, as was conceded, generally engaged in the transportation of goods for hire; and as such owners, the defendants, by their captain, received on board the cotton in question, to be transported from the port of New York to Norwich. That the defendants, as owners of this vessel, were common carriers, and as such, liable to all the responsibilities resulting from that employment, is well settled in the American courts; and in England, it was never disputed as a principle of mercantile law, although in that country, by stat. 26 Geo. III., the liability of ship owners has been modified: 2 Kent Com. 465; Story on Bail. 323; *Richards et al. v. Gilbert*, 5 Day, 415; *Williams et al. v. Grant*, 1 Conn. 487 [7 Am. Dec. 235]; *Coll v. McMechin*, 6 Johns. 159 [5 Am. Dec. 200]; *Schieffelin v. Harvey*, 6 Id. 170 [5 Am. Dec. 206]; *Watkinson v. Laughton*, 8 Id. 213; *Stewart v. Russell*,¹ 10 Id. 1; *Kemp et al. v. Coughtry*, 11 Id. 107; *McClures v. Hammond*, 1 Bay, 99 [1 Am. Dec. 598]; *Bell v. Reed*, 4 Binn. 127 [5 Am. Dec. 398].

In most of the cases here referred to, attempts were made to

1. *Elliott v. Russell*; 8 C., 6 Am. Dec. 306.

induce the courts to relax, what was called the severity of the common law rule on this subject; but we have found, in the commercial states of this Union, with perhaps the exception of Louisiana, but one case in which such an attempt was successful. In the case of *Aymar v. Astor*, 6 Cow. 266, the supreme court of the state of New York decided, that "the masters or owners of a vessel transporting goods on the high seas, are not common carriers; and in an action against them for loss or damage of goods, for any other cause than the act of God, etc., it should be submitted to the jury upon the evidence, whether they used ordinary care and diligence;" thus giving countenance to the claim of the defendants in the present case. Of this case the late Chancellor Kent says: "It has gone far to unsettle and reverse the former doctrine in the state of New York, in respect to carriers by water." And again: "I apprehend, with great deference, that the case of *Aymar v. Astor*, so far as it meant to decide, that masters of vessels are not liable as common carriers, is not to be taken for sound law." And Mr. Justice Story, referring to the same case, says: "The decision is in direct repugnance to prior decisions made on the same point, in the same court."

We are not dissatisfied with the reasons which originated the common law responsibility of common carriers, and believe they apply, with peculiar force, at this day, and in this country, as it respects carriers by water, more especially; upon which element a spirit of dangerous adventure has grown up, which disregards the safety, not of property merely, but of human life. The bill of lading in evidence in this case, wherein the dangers of the seas are excepted, did not vary or qualify the liability of the defendants as common carriers. The act of God, inevitable accident, dangers of the sea, etc., are expressions of very similar legal import, and excuse a loss, whether they are repeated in a bill of lading or not: 3 Kent Com. 171; *Williams v. Grant*, 1 Conn. 492 [7 Am. Dec. 235].

We conclude, therefore, with the judge at the trial, that the question was not one of care or prudence, but of misconduct or deviation on the part of the master or owners.

2. It was claimed by the defendants, that if the cotton was thrown overboard to save the vessel, and the lives of those on board, this was a loss by dangers of the seas, within the exception of the bill of lading, and not the consequence of the master's misconduct. If this were all, this claim of the defendant's could not be resisted; and so the jury were instructed. This

raised the question of deviation, which the plaintiffs insisted the master had been guilty of; for if there had been a deviation in the voyage from New York to New London and Norwich, by reason of which the storm was encountered, and the danger incurred, it was such misconduct as would subject the defendants, and deprive them of the justification which they would have had if the same loss had been incurred in the prosecution of a voyage properly conducted.

There was a deviation, if the master, without reasonable necessity, either physical or moral, departed from the usual route of vessels between the ports of New York and New London; and of such deviation freighters, as well as insurers, may take advantage: 3 Kent Com. 165; *Williams v. Grant*, 1 Conn. 492 [7 Am. Dec. 235]; *Davis v. Garrett*, 6 Bing. 716; *Read v. Commercial Ins. Co.*, 3 Johns. 352 [3 Am. Dec. 495]; *Urquhart v. Barnard*, 1 Taunt. 456; Hughes on Ins. 197.

It was conceded in this case, and the fact is too notorious for dispute, that the usual track of vessels from New York to New London, and other eastern ports, is through Long Island sound, both summer and winter. Was the master, in the present instance, justified in departing from this route, and performing his voyage through the open sea, on the south side of Long Island, in the month of February? Was there any reasonable necessity for this? We think there was not. The claim is, that the navigation of the sound was obstructed by ice, and so continued longer than had been usual in former seasons. Still we see no necessity for the sailing of this vessel, while these obstructions continued. The obstruction was of such a nature, that the master and all concerned knew, that at a day not very remote it must be removed. This was known when the goods were placed on board. There was no contract which rendered it the duty of the master to sail by a given time, or to complete his voyage before a specified day. And if there had been, the freezing of the sound, and the unusual continuance of the obstruction, was such an act of God as would probably have justified a longer stay in the port of departure.

The distinction is a very obvious one between the present case and one in which a vessel already on her voyage and *in transitu* departs from the usual route, by reason of obstructions of this nature, or of blockades, etc. In such cases the master must act; a necessity is thrown upon him; and if he is governed by a sound discretion, he stands justified. But here it may as well be claimed, that the master would be justified in leaving a safe

port during the existence of a violent tempest, or in the face of blockading or embargo restrictions, because it might be uncertain how long these impediments would be in his way. The port of destination in this voyage was Norwich; and it is conceded that the obstruction caused by ice to the navigation of the river Thames, usually continues several days longer than the sound continues frozen. The master knew, therefore, that he could not complete his voyage earlier in consequence of the course he adopted.

But it is said, that the danger from fire, thieves, etc., while lying in the port of New York, created such a necessity of sailing as justified the master in taking the outside passage. It is true, that danger of this sort, to some extent existed, and does always exist, in all ports; and perhaps very nearly as much at one port as another—as much at Norwich and New London, as at New York. This pretended danger, certainly, could not be esteemed imminent or uncommon; and could not justify any unusual or hazardous experiment: *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487. No fact appears, from which we can infer any necessity for the sailing of this vessel on the outside of Long Island; and by adopting that route, we think the master was guilty of a deviation. It is claimed, to be sure, that this was a question of fact; and as such, ought to have been submitted to the jury. We have ever supposed, that upon given facts, whether deviation or not, was a question of law; and so we find it treated in all the cases: *Suydam v. Marine Ins. Co.*, 2 Johns. 138; *Graham v. Commercial Ins. Co.*, 11 Id. 352; *Jackson d. Brown v. Betts*, 9 Cow. 208; *Newell v. Hoadley*, 8 Conn. 381.

3. Although it was not denied, that the general usage of vessels bound from New York to New London and eastern ports, was, to sail through Long Island sound, as well in the winter as at other seasons; yet the defendants claimed that there was, to some extent, a practice for such vessels, when the sound was obstructed by ice, to sail on the south side of the island; or at least, that the exceptions from the general usage were so frequent as that the master in the present case, could take the outside voyage, without being guilty of a deviation. On this point the jury were instructed that no practice or usage for such vessels to perform their voyages on the south side of Long Island, when the sound is frozen, and the navigation for that season obstructed, would justify the master in prosecuting his voyage on said south side, instead of waiting in New York until the usual navigation became free, unless such usage

was general, and of so long standing as to have become generally known.

If the question in the case had been one of care and prudence merely, perhaps such partial usage might have been material to show a want of gross negligence on the part of the master; but that was of no avail to show there had been no deviation. Freighters and insurers, in all their commercial transactions, are presumed to act and to contract in reference to known and general usage, and to submit to it; and such general usage may be well enough said to become a part of all their contracts. And if without consent, a partial practice is substituted as governing a voyage or other commercial operation, it operates as interposing a new contract, not agreed to by the parties, and perhaps as a fraud. Indeed, usage should not be regarded at all, unless it be of such a character as may be supposed to influence parties; and none can be ordinarily presumed to do this, but such as is public and continued. And therefore, it is not sufficient to prove a few instances, not amounting to general practice, as an excuse of what otherwise would have been a deviation: *Martin v. Delaware Ins. Co*, 2 Wash. C. C. 254; 1 Cond. Marsh. on Ins. 186, note; Hughes on Ins. 145; *Gabay et al. v. Lloyd*, 3 Barn. & Cress. 793; *Trott v. Wood*, 2 Gall. 444;¹ *Barber v. Brace*, 3 Conn. 10 [8 Am. Dec. 149]; *Lawrence v. Stonington Bank*, 6 Id. 521; *Gibson v. Culver*, 17 Wend. 305.

4. Another consideration has been urged upon us, by the defendants, as furnishing a defense to this action. But we can not listen to it.

The owners of this cotton, as soon as they were advised by their correspondent in New York, that the *Maria* had taken, or would, without their consent, take the outside voyage, effected an insurance upon it, on such voyage, and after the loss, demanded payment of the underwriters. Whether there are any equitable circumstances, which, as between these parties, ought to induce the plaintiffs to resort to the underwriters for indemnity, we do not know. Certain it is, that the mere fact that an insurance has been effected upon goods, will not discharge carriers from their legal responsibilities to freighters. Neither the insurance, nor demand of payment, furnished any evidence of the consent or acquiescence of the plaintiffs in the voyage actually pursued. They had no reason to suppose it was contemplated until it was too late to interfere; and then they had a right to fortify themselves with as many means of

1. 1 Gall. 443.

indemnity as they pleased, and resort, in the event, to any remedy they had, either against the ship-owners or the insurers.

5. The court believe, that such part of Averill's deposition as was objected to, did not conduce to prove the fact for which it was admitted; and was, therefore, irrelevant in that respect. But as it was admitted only as conducing to show a general usage, which was not denied, it had no manner of effect in this particular; and its admission furnishes no ground for a new trial.

We ought to remark, however, that we are not influenced in this opinion, by the statement in the motion, that the usage referred to was satisfactorily proved by other testimony; for whether it was so or not, we are of opinion it was for the jury alone conclusively to decide. Such statements in motions for new trials, upon the authority of a similar one in the case of *Landon v. Humphrey*, 9 Conn. 209 [3 Am. Dec. 333], have sometimes been made and perhaps before the decision of that case; yet upon more reflection, we are led to doubt the propriety of this practice; and decide not to regard it in future.

We do not advise a new trial.

In this opinion the other judges concurred. New trial not to be granted.

Cited with approval in *Hale v. N. J. Nav. Co.*, 15 Conn. 544, upon the point that owners of vessels who transport goods for hire are common carriers. And in *Sturges v. Buckley*, 32 Id. 20, it was held that a general custom is binding upon a person, although he has no actual notice thereof, citing principal case.

COMMON CARRIERS, WHO ARE.—See generally as to who are common carriers: *McClures v. Hammond*, 1 Am. Dec. 598, note 599; *Williams v. Branson*, 4 Id. 562; *Roberts v. Turner*, 7 Id. 311; *Dwight v. Brewster*, 11 Id. 133; *Craig v. Childress*, 14 Id. 751, note 752; *Robertson v. Kennedy*, 26 Id. 466; *Beckman v. Shouse*, 28 Id. 653. In *Harrington v. McShane*, 27 Id. 321, it was held that the owners of steamboats transporting goods on freight are common carriers, and are liable for all losses in the course of their employment as such, except those occasioned by the act of God or the public enemy. A similar ruling was made in *Turney v. Wilson*, Id. 515, it being there held that boatmen on the Mississippi river, carrying goods for hire, were common carriers.

“DANGERS OF THE SEA.”—This expression, and “dangers of the river,” are analogous terms, and are considered as having the same meaning when used in the contract of a common carrier: *Jones v. Pitcher*, 24 Am. Dec. 716; *Turney v. Wilson*, 27 Id. 515, note 517. They include the natural accidents incident to navigation on river or sea, as the case may be, but not such accidents as might be avoided by the exercise of that prudence and foresight which may be expected of persons engaged in such navigation: *Williams v. Branson*, 4 Id. 562; *Jones v. Pitcher*, 24 Id. 716.

USAGE TO CONTROL OR VARY COMMON CARRIER'S LIABILITY.—See *Oe-*

trander v. Brown, 8 Am. Dec. 217, and *Gordon v. Little*, 11 Id. 632 and notes. In the latter case evidence of a usage or custom was held admissible to fix the construction of the words "inevitable dangers of the river," in a bill of lading for goods carried on an inland river. See generally as to the admissibility of evidence of a usage where there is a written contract between the parties: *Eager v. Atlas Ins. Co.*, 25 Am. Dec. 363, and decisions in the note thereto. Also *Pavey v. Burch*, 26 Id. 682.

LOSS ARISING FROM "ACT OF GOD:" See *Colt v. McMechea*, 5 Am. Dec. 200; *Williams v. Grant*, 7 Id. 235; *Smyrl v. Niolon*, 23 Id. 146.

ANDREWS v. MORSE.

[12 CONNECTICUT, 444.]

AN ATTORNEY HAS A LIEN upon the judgment and execution of his client, as against the debtor, with notice, for his services and disbursements in the progress of the suit, which courts of law and equity will protect, subject to the equitable rights of others.

WHERE AN ATTORNEY, HAVING OBTAINED A JUDGMENT in favor of his client, who had no other property, claimed a lien thereon for his fees and disbursements, and gave notice of such claim to the creditor and debtor, and subsequently the latter paid the judgment, regardless of the attorney's claim, the latter may, notwithstanding such payment, proceed with the execution against the debtor. to the extent of the fees and disbursements.

BILL in chancery, for an injunction to restrain further proceedings in the collection of an execution in favor of Morse. In September, 1837, Morse recovered judgment against Andrews, before the superior court, on which the execution mentioned in the bill was issued. Phelps, Hungerford, and Cone, attorneys at law, were employed by Morse as counsel in the case, and had the management of it from its commencement to its determination. For the services thus rendered, and for certain disbursements made by them in the progress of the suit, Morse became indebted to them. When the execution was issued, it was placed in the hands of a deputy sheriff, with directions to pay the proceeds to the attorneys, so that they might retain their fees and expenses therefrom. Notice was also given both to Morse and Andrews of the lien claimed. Subsequently Morse and Andrews entered into an arrangement by which the latter gave the former certain notes in satisfaction of the judgment; but notwithstanding this, the officer having the execution proceeded, under the direction of the attorneys, to levy upon Andrews' property to enforce the judgment to the extent of their liens. Morse had no other property than the judgment

in his favor. A temporary injunction was issued to prevent the enforcement of the execution.

W. W. Ellsworth, for the plaintiff.

Hungerford, for the defendant.

CHURCH, J. The facts, as drawn up and agreed to, by the parties in this case, present but a single question: Have the attorneys of the plaintiff in the execution, by whom professional services have been rendered and moneys disbursed, in the progress of the suit which produced the execution, such a claim upon the judgment and execution, as against the defendant therein, as ought to be protected?

We have believed that the opinion expressed by us, in the case of *Gager et al. v. Watson*, 11 Conn. 168, sanctioned this claim of the attorneys; but as this has been doubted, we will consider the question again. We do not say, nor do we believe, that attorneys in any case have a lien upon the judgments and papers of their clients similar to that which manufacturers and others have upon goods and moneys in their hands. We only say, that they have, in certain cases, of which this is one, such a claim upon them as courts of law and equity will protect and enforce, until their lawful fees and disbursements are paid, subject to the equitable rights of others. This claim, which has been generally denominated a lien, has long been recognized, by the English courts of law and equity; although the court of king's bench has extended the claim of the attorney farther than the court of common pleas has been willing to follow. And in courts of equity, the precise extent of the lien has not been uniformly recognized. The variety of practice on this subject in the English courts, at length produced a rule of the twelve judges, by which, in 1832, the practice of the court of king's bench was adopted, as applicable to all the courts. But we think the attorney's lien, to the extent to which we recognize it, has not been denied, in any of the common law courts of England.

In the case of *Rumrill v. Huntington*, 5 Day, 163, Trumbull, J., in giving the opinion of the court, says: "It is a general principle, that an attorney has a lien for his services and expenses on the papers and securities of his client, etc. But an attorney has no lien upon a judgment obtained in favor of his client, which can vary or affect the rights of a stranger." And we said in the case of *Gager et al. v. Watson*, that "the at-

torney's lien upon judgments is subject to the equitable claims of the parties in the cause, as well as to the rights of third persons, which can not be varied or affected, by such lien." A claim of the attorney to this extent was recognized in the following cases, decided by the court of common pleas and king's bench: *Emden v. Darley*, 1 N. R. 22; *Swain v. Senate*, 2 Id. 99; *Wilkins et al. v. Carmichael*, Doug. 101; *Mitchell v. Oldfield*, 4 T. R. 123; *Randle v. Fuller*, 6 Id. 452; *Read v. Dupper*, Id. 360; *Ormerod v. Tate*, 1 East, 464.

In the case of *Pinder v. Morris*, 3 Cai. 165, the supreme court of the state of New York held, that if the defendant pay to the plaintiff the debt and costs, after notice from the attorney, he pays in his own wrong; and this is the principle established or recognized in the two last cases cited from the English books. This subject is well considered, by the same court, in the case of *Martin v. Hawks*, 15 Johns. 405; and the claim of the attorney placed, as we think, upon its true ground. In that case, the attorney is treated in regard to his lien, as the assignee of a chose in action is considered, who takes it subject to all the rights and equities attached to it. And this is considered the true doctrine, by Lord Mansfield, in the case of *Welsh v. Hole*, Doug. 238, and by Lord Kenyon, in the case of *Read v. Dupper*, 6 T. R. 361, and by the court of errors of the state of New York, in the case of *Nicoll v. Nicoll*, 16 Wend. 446. This principle is entirely consistent with the doctrine of this court in the cases of *Rumrill v. Huntington*, and *Gager et al. v. Watson*.

If we apply this principle to the facts in this case, we can not fail to discover, that the claims of the attorneys here have not been defeated, by any legal or equitable rights of others; but exist as perfectly against Andrews, the execution debtor, who prosecutes this injunction, as against their own client, Morse. The execution was delivered, by the attorneys, to the officer, with a notice of their lien, and with directions to collect and pay over its proceeds to them. And the same notice was given to the debtor in the execution, before anything had transpired, changing the relative rights or duties of any of the parties interested, and before anything had been paid on the execution. Under these circumstances, this debtor had no equitable claims. He paid with full notice of the attorneys' prior claim, and in defiance of it. In this, his conduct was collusive and fraudulent, and the payment was made in his own wrong.

We shall advise the superior court, that the injunction in

this case ought to be dissolved; and that the plaintiff take nothing by his bill.

In this opinion the other judges concurred. Bill to be dismissed.

Cited in *Benjamin v. Benjamin*, 17 Conn. 113.

ATTORNEYS' LIENS FOR COMPENSATION AND COSTS.—A lien is sometimes defined to be a charge imposed upon specific property for the performance of an act: Civil Code of Cal., sec. 2872. Or, in a more general sense, it is the right which a creditor has to control the enjoyment or forbid the disposal of some specific property until its owner has discharged the debt: Abb. L. Dict., tit. "Lien." By the common law of England, and also in most of the United States, attorneys at law and solicitors in chancery are entitled to a lien upon certain property of their clients as security for their compensation and costs. This lien extends to a fund recovered by their aid, whether in legal or in equitable proceedings, and is of two kinds. The first is generally termed the special, particular, or "charging lien," and is imposed upon the property of the client, on account of labor bestowed or money expended in regard to that particular property: Weeks on Attorneys, sec. 369; *McDonald v. Napier*, 14 Ga. 89. This lien is not confined to the particular document or paper the attorney is employed to prepare, but it attaches on all deeds, papers, and documents of the client coming into the attorney's hands in the regular course of business in the transaction for which he is employed, whether for the purpose of copying, abstracting, or perusing: Weeks on Attorneys, sec. 369; *Hollis v. Olaridge*, 4 Taunt. 807; *Ex parte Nesbitt*, 2 Sch. & Lef. 279; *Gist v. Hanly*, 33 Ark. 233. Neither is it confined to deeds and papers, but extends also to other articles delivered for the purpose of being exhibited to witnesses on the trial of an action: *Friswell v. King*, 15 Sim. 191. It also extends, as will hereafter appear, to money or other property recovered or preserved through the labor and skill of an attorney for his client. In some cases, however, it has been held not to affect real property recovered in an action of ejectment: *Humphrey v. Browning*, 46 Ill. 476; *Martin v. Harrington*, 57 Miss. 208. The other lien allowed an attorney is a more general one, extending not only to property of a client upon which labor has been bestowed, but to all property of a client held by an attorney, for such sum as may be due him on account of professional services rendered: Weeks on Attorneys, sec. 369.

PARTICULAR OR CHARGING LIEN.—In England this lien of attorneys and solicitors upon money or other property recovered by their aid, or upon a fund or estate in litigation, for their bill of costs, and advances, was early recognized by the common law as being founded upon the plainest principles of equity and justice: *Wilkins v. Carmichael*, 1 Doug. 104; and courts, whether of law or of equity, have always been particularly careful to protect and enforce such liens: *Welsh v. Hole*, Id. 238; *Baker v. St. Quentin*, 12 Mee. & W. 441; *In re Freehold Co.*, 22 Law T. (N. S.) 195; *In re Bank of Hindustan*, 3 Law Rep. Ch. App. 125; *Turwin v. Gibson*, 3 Atk. 720; *Bawtree v. Watson*, 2 Keen, 713; *Skinner v. Sweet*, 3 Madd. 244. Thus, says Lord Mansfield, in *Welsh v. Hole*, 1 Doug. 238: "An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain it to the amount of the bill. He may stop *in transitu*, if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney

gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice." This has now become the law of England by express statute: 23 and 24 Vict., c. 127, sec. 28. By this act it is provided that, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses, or in reference to such matter or proceeding." This section also provides that all conveyances and acts done to defeat such charge or right, except in case of a *bona fide* purchaser, shall be absolutely void. Under this statute an attorney can have a charge only upon property recovered, or preserved by him for his client in respect of the costs in the particular suit or proceeding in which they were incurred, and not for general costs: Weeks on Attorneys, sec. 370; *Ex parte Thompson*, 3 Law T. (N. S.) 317; *Wilson v. Round*, 9 Id. 675; S. C., 4 Giff. 416.

This special lien, as it is sometimes called, *McDonald v. Napier*, 14 Ga. 89, attaches to the fruits of the labor and skill of an attorney, whether realized by judgment or decree, or by virtue of an award, or in any other way, so long as they are the result of his exertions: *Ex parte Price*, 2 Ves. sen. 407; *Turwin v. Gibson*, 3 Atk. 720; *Mitchell v. Oldfield*, 4 T. R. 123; *Skinner v. Sweet*, 3 Madd. 244; *Ormerod v. Tate*, 1 East, 464; *Irving v. Viand*, 2 You. & J. 70; *Barnesley v. Powell*, Amb. 102. In *Ormerod v. Tate*, *supra*, Lord Kenyon remarked: "The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be found to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien:" See *Hutchinson v. Howard*, 15 Vt. 544. So this lien also attaches to money paid or payable into court in the course of an action or suit, and also to money paid by way of compromise to the client, although the verdict and judgment are against him: Weeks on Attorneys, secs. 369, 370; *Davies v. Lowndes*, 3 Com. Bench, 823. See *Hopewell v. Amwell*, 2 Halst. (N. J.) 4.

In the United States this lien is also recognized and enforced the same as in England. It is allowed by the supreme court of the United States, and in some of the states it is held to extend not only to costs and advances, but to fees for services rendered: *Wylie v. Cox*, 15 How. (U. S.) 415; *Sexton v. Pike*, 8 Eng. (Ark.) 193; *Waters v. Grace*, 23 Ark. 118; *Carter v. Davis*, 8 Fla. 183; *Benjamin v. Benjamin*, 17 Conn. 110, citing principal case; *Newbert v. Cunningham*, 50 Me. 231; *Cooly v. Patterson*, 52 Id. 472; *Stratton v. Hussey*, 62 Id. 286; *Peirce v. Bent*, 69 Id. 381; *Power v. Kent*, 1 Cow. 172; *Martin v. Hawks*, 15 Johns. 405; *Rooney v. S. A. R. Co.*, 18 N. Y. 368; *B. G. Sav. Bank v. Todd*, 52 Id. 489; *Walker v. Sargeant*, 14 Vt. 247; *Hutchinson v. Howard*, 15 Id. 544. An examination of the cases just cited will

show that this lien is held to cover not only costs and advances incurred, but also the compensation of the attorney for services rendered in the particular case in which the money or other property has been recovered or protected. So, in some instances, it is held to include money paid by the attorney for traveling expenses incurred in prosecuting the business of his client: *Hearll v. Chipman*, 2 Aik. 329; *Walker v. Sargeant*, 14 Vt. 247. In some of the states, statutory enactments are found regulating the extent of this lien, while in others it is totally denied; but the attorney has the right to deduct such charges from funds of his client in his hands: *Weeks on Attorneys*, sec. 370; *Baker v. Cook*, 11 Mass. 236; *Bank v. Culver*, 54 N. H. 327; *Hill v. Brinkley*, 10 Ind. 102; *Friswell v. Haile*, 18 Mo. 18; *Irwin v. Workman*, 3 Watts, 357; *Newbaker v. Alricks*, 5 Id. 183; *Walton v. Dickerson*, 7 Barr, 376; *Dubois' appeal*, 38 Pa. St. 231. Some authorities limit the lien to the costs and disbursements allowed by statute: *Ex parte Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Id. 517; *Russell v. Conway*, 11 Id. 103; *Cozzens v. Whitney*, 3 R. L. 79; *Currier v. R. R.*, 37 N. H. 223; *Wells v. Hatch*, 43 Id. 246; *Dodd v. Brott*, 1 Minn. 270.

In *Ex parte Kyle*, 1 Cal. 331, an application was made to require the defendant, against whom a judgment had been recovered, to pay to the attorney of the plaintiff a *quantum meruit* compensation for his services in conducting the suit on behalf of plaintiff. Bennett, J., in delivering the court's opinion, thus states what has since been recognized as the law of California: "An attorney has a lien for his costs upon money recovered by his client or awarded to him in a cause in which the attorney was employed, in case the money has come into the hands of the attorney; or the latter may stop the money *in transitu*, by giving notice to the opposite party not to pay it, until his claim for costs be satisfied, and then moving the court to have the amount of his costs paid to him in the first instance; and if, notwithstanding such notice, the other party pay the money to the client, he is still liable to the attorney for the amount of his lien, and the attorney, in such case, shall not be prejudiced by any collusive release given by the client; unless, however, such notice be given, the client may compromise with the opposite party, and give him a release without the intervention of his attorney, and the attorney, in that event, can afterwards look to his client only for payment: *Graham Pr.* 61. It thus appears that an attorney has a lien for his costs upon a judgment recovered by him, which may be enforced upon giving notice to the adverse party, not to pay the judgment until the amount of the costs be paid, and in some cases, when there has been collusion between the parties to cheat the attorney, the court has required the client to satisfy them. But this practice is confined to some fixed and certain amount allowed an attorney by statute, and is not extended to cases where an attorney or counselor claims a *quantum meruit* compensation for his services. In this state we have no statute giving costs to attorneys, and they must consequently recover for their services in the ordinary way." This rule was approved in *Mansfield v. Dorland*, 2 Cal. 517; and *Russell v. Conway*, 11 Id. 103. And in *Humphrey v. Browning*, 46 Ill. 485; *Warfield v. Campbell*, 38 Ala. 532; and *Stewart v. Flowers*, 44 Miss. 519, 530, 531, the decision in *Ex parte Kyle* was cited and reviewed.

In *Humphrey v. Browning*, 46 Ill. 476, it was held that an attorney has no lien for his compensation upon real estate recovered in an action of ejectment. Also in *Martin v. Harrington*, 57 Miss. 208. In most of the English cases referred to, it will be observed that the lien thus secured to attorneys and solicitors is held to cover only the costs legally taxable in the case, nothing

being said as to whether fees for services rendered are included or not. In *McDonald v. Napier*, 14 Ga. 110, where the subject received an exhaustive examination by Nisbet, J., it was said that in England the lien of an attorney exists for what is termed the "attorney's bill," which includes the fees of the attorney as ascertained by law, and his disbursements and charges on account of his client. After considering the history of the establishment of attorneys' liens in England, and concluding that the practice of courts, in allowing them, had become a fixed principle of the common law, founded on principles of justice, the learned judge said: "But it is insisted that in England the lien exists only as security for the costs which by law are taxable in the course of the business of the attorney, and has never been extended to any compensation other than that, and can be extended here no farther. Upon this reasoning, lawyers in Georgia have no lien whatever; for with us they are entitled to no costs. But I do not understand it to be limited in England to legal costs. It exists there for the attorney's bill, and that is made up of his fees ascertained by law, and his disbursements and charges on account of his client. If the idea of the client was true as to the limitation in England, I should find no difficulty in extending the lien to fees of counsel in Georgia. The rule which secures legal costs where legal costs are provided by law as a compensation, will by an irresistible implication secure the compensation agreed upon by the parties, where none is provided by law. Disbursements, however, come in under the lien in England, and although these are made to constitute a part of the attorney's bill, yet stand upon a different footing, which the law provides as a compensation. They are claims standing in account against the client, and if for them the lien prevails, why should not a claim for services rendered be also covered by the lien?" With this explanation, the reason why in some of the states of the Union this lien is held to cover the fees of an attorney, while in England it only extends to legal costs, will be apparent. See also *Stewart v. Flowers*, 44 Miss. 513, and *Warfield v. Campbell*, 38 Ala. 527, for an extended discussion of this question.

WHEN THE LIEN ATTACHES.—The rule established by the weight of the authorities seems to be that the lien of an attorney for his compensation and costs upon the property or money recovered by his client in the course of litigation, does not attach until the entry of judgment in favor of his client: *Hobson v. Watson*, 34 Me. 20; *Getchell v. Clark*, 5 Mass. 309; *Henchey v. City of Chicago*, 41 Ill. 136; *Shank v. Shoemaker*, 18 N. Y. 489; *Foot v. Tewksbury*, 2 Vt. 97; *Sweet v. Bartlett*, 4 Sandf. 661; *Ex parte Kyle*, 1 Cal. 331; *Coughlin v. N. Y. C. R. R. Co.*, 71 N. Y. 443. In *Getchell v. Clark*, *supra*, it was said, "that before judgment, it was very clear that the plaintiff might settle the action and discharge the defendant without, or against the consent of his attorney, who had no lien on the cause for his fees." Thus it would seem, that the parties, by an amicable adjustment of their controversies prior to judgment, may defeat the lien of their attorneys for their costs and services rendered: *Coughlin v. N. Y. C. R. R. Co.*, 71 N. Y. 443; but see *Johnson v. Storey*, 1 Lea (Tenn.), 114. Courts, however, although almost always inclined to do anything that will lead to a settlement of litigation, will not, if the attorney's only chance of payment depends upon the result of the cause, allow a release obtained from the plaintiff pending the proceedings to be set up to defeat his claim unless the proceedings are taken by an unauthorized attorney: *Weeks on Attorneys*, sec. 369; *Wright v. Burroughes*, 4 Dow. & L. 226; *Ex parte Bryant*, 2 Rose, 237; *Abbott v. Rice*, 3 Bing. 132. Neither is the lien of an attorney divested by the fact that the judgment obtained by him became dormant, and was afterwards revived by other attorneys: *Jenkins v. Stephens*, 60

Ga. 216. The lien attaches, however, in case of an award, the same as though a judgment had been entered: *Hutchinson v. Howard*, 15 Vt. 544; *Ormerod v. Tate*, 1 East, 464. Under the English act of 23 and 24 Vict., c. 127, sec. 28, above cited, where a suit is stopped by the parties before any property has been "recovered or preserved," no lien attaches: *Pinkerton v. Easton*, L. R., 16 Eq. Cas. 490; *Foxon v. Gascoigne*, L. R., 9 Ch. App. 654.

GENERAL LIEN.—Attorneys have a general lien upon all the papers and documents of their clients in their possession, not only for all the costs and charges due them in the particular cause in which the papers and documents come into their possession, but also for the costs and charges due to them for other professional business and employment in other causes: Story on Agency, sec. 383; *Hooper v. Welch*, 43 Vt. 171; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *Ex parte Nesbit*, 2 Sch. & Lef. 279; *Ex parte Sterling*, 16 Ves. 258; *Ex parte Pemberton*, 18 Id. 282; *Stevenson v. Blakelock*, 1 Mau. & Sel. 535; *Worrall v. Johnson*, 2 Jac. & W. 218. General liens of this kind are not favored by the common law: *Scarfe v. Morgan*, 4 Mee. & W. 285; and they do not, like the special or particular lien, attach to a fund in court, or the property in dispute, except in case of bankruptcy or lunacy, where it is held that a general lien for the management of the property attaches on the fund or body of the estate: Weeks on Attorneys, sec. 371; *Lann v. Church*, 4 Madd. 391; *Barnesley v. Powell*, Amb. 102; *Ex parte Price*, 2 Ves. sen. 407. This lien does not attach to papers and documents which have come into the hands of an attorney or solicitor, other than in the course of his employment as such. Thus, where papers were received by a solicitor as *prochein ami* of an infant, it was held, that he had no lien: Montague on Lien, 59. So where property is left with an attorney for a specific purpose, this general lien will not attach thereto: *Balch v. Symes*, 1 Turn. & R. 92; *Lawson v. Dickenson*, 8 Mod. 306; but if the property is allowed to remain in an attorney's hands after the specific purpose for which it is left is fulfilled, the general lien will attach: *Ex parte Pemberton*, 18 Ves. 282. In *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489, an attorney was held to have a lien upon the papers in a foreclosure suit, not only for the costs and charges in the suit, but for any general balance in other professional business. The same doctrine is reiterated in *Hooper v. Welch*, 43 Vt. 171, decided in 1871. It was there said, that "the law seems to be well settled, first, that an attorney has, as between himself and his client, a general lien upon all papers in his hands, and upon the balances equitably due thereon, not only for his expenses incurred in the particular suit, but for any balance due him." See also *Hutchinson v. Howard*, 15 Vt. 544; *In re Paschal*, 10 Wall. 493. In the latter case, the supreme court of the United States held, that an attorney or solicitor, who is also counsel in a cause, has a lien on money collected therein for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer.

WAIVER OF LIEN.—The lien secured by law to an attorney to reimburse him for costs and expenses incurred in the business of his client, and to secure the payment to him of his fees for services rendered, is liable to be defeated or lost in a number of different ways. Thus, the lien is said to be lost by parting with the possession of the deeds or other papers upon which it may have attached: *Clark v. Gilbert*, 3 Bing. (N. C.) 353; Weeks on Attorneys, sec. 375; *Nichols v. Pool*, 89 Ill. 491; see *Jones v. Cliffe*, 3 Tyrw. 577. But if the papers are improperly taken away from him the lien is not lost: *Dicas v. Stockley*, 7 Car. & P. 587. So it is held that the lien is superseded by taking security for the debt which is the subject of the lien: Weeks on

Attorneys, sec. 375; *Balch v. Symes*, 1 Turn. & R. 92; *Cowell v. Simpson*, 16 Ves. 275. So where an attorney procured the satisfaction of the judgment upon which he had a lien, and perfected the client's title to land attached in the action, he was held to have waived his lien: *Cowen v. Boone*, 48 Iowa, 350.

FOX v. HOYT.

[12 CONNECTICUT, 491.]

EVERY ACT OF A COURT OF COMPETENT JURISDICTION is presumed to have been rightly done until the contrary appears; and this rule applies as well to every judgment or decree rendered in the various stages of the proceedings, from their initiation to their completion, as to an adjudication that the plaintiff has a right of action.

JUSTICE OF THE PEACE HAVING JURISDICTION of a cause before him, and this appearing from the face of the process and proceedings, has jurisdiction over all interlocutory acts necessary to a final judgment.

COURTS OF RECORD ARE THOSE PROCEEDING according to the common law, whose judgments may be revised by writs of error, and whose proceedings and judgments import absolute verity, and until reversed, protect all who obey them.

COURTS OF JUSTICE OF THE PEACE in this state are, in this respect, courts of record, the same as the county and superior courts.

RECITAL IN THE RECORD OF A JUSTICE OF THE PEACE, that "the parties were duly notified," is sufficient to sustain a judgment by default, without stating the facts necessary to constitute a legal notice.

A JUDGMENT OF A JUSTICE OF THE PEACE in an action of book debt upon the defendant's default, "that the plaintiff recover of the defendant the sum of five dollars damages, and his costs of suit," is sufficient.

ACTION of book debt, brought by Fox against Hoyt. The defendant was summoned to appear before a justice of the peace on January 13, 1838. On January 20, 1838, a judgment was rendered for the plaintiff, the record of which is as follows: "Fairfield county, ss. Stamford, January 20, 1838. At a justice's court, holden at Stamford, at the house of Nathan Gregory, by the subscribing authority, on the day above written—Richard Fox against Rufus Hoyt—action of book debt, demanding five dollars damages. The parties having been duly notified, on the thirteenth day of said January, to appear at the above place and time, at two o'clock P. M., according to law, the said authority having been absent and out of said Stamford, at the time specified for trial in the foregoing writ, the plaintiff appeared, but the defendant made default of appearance; whereupon it is considered that the plaintiff recover of the defendant the sum of five dollars damages and his costs of suit." The superior

court reversed the judgment of the justice, and thereupon the record was removed to this court for revision.

Betts and Butler, for the plaintiff.

Hawley and Ferris, contra.

CHURCH, J. The record of the justice court shows, with sufficient certainty, that the defendant, in the original action, upon a proper process, legally served, and in a case of which the justice had jurisdiction, was legally summoned to appear before Justice Adams, on the thirteenth day of January, 1838; and that on that day the justice was absent from the town where the trial was to be had. The record then proceeds to state, that on the thirteenth day of January, "the parties were duly notified" to appear again for trial on the twentieth day of January, at two o'clock P. M., when the plaintiff appeared, and the defendant made default of appearance. Whereupon it was considered that the plaintiff recover five dollars damages, etc.

Two causes of error are assigned as apparent upon this record: 1. That it does not appear that Justice Adams gave notice to the parties in writing, to appear before him, for the trial of said action, on the twentieth day of January; nor that the notice was served, either by reading, or leaving a copy with the parties, in conformity with the provisions of the statute of 1833; and 2. That it does not appear that Justice Adams found or adjudged any debt to be due to the plaintiff.

1. The statute of 1833, in addition to the act for regulating courts, etc., enacts, "that whenever any writ, suit, or civil process, shall be made returnable before any justice of the peace, and at the time appointed for the trial of the same, said justice shall be absent from the town where the trial is to be had, said justice may, at any time within twenty days after the said time for trial, proceed to try said cause, in the same manner as he might have done at said time named for trial: Provided, that he shall give six days' previous notice of the time and place of said trial, to the parties in said cause, in writing, to be read in hearing of said parties, or a true and attested copy thereof to be left at their usual place of abode." Before the enactment of this law, if a justice of the peace was absent, at the time of trial, no legal provision existed for the continuance of his power and jurisdiction over the action; and no further proceedings could be had in the suit. That the justice in this case, after the return day of the writ, the thirteenth day of January, could proceed no further, unless he caused the parties to be notified

in writing, in the manner prescribed by the statute, is not a matter for dispute, and can not be. But the question is, whether the facts necessary to constitute a legal notice, should have been detailed upon the record of the justice, and for want of this, the judgment be erroneous? Or was it enough that it was found and stated, by the justice, that "the parties were duly notified?"

This action, at its commencement, was clearly within the jurisdiction of the justice. The sum in demand, the process and the parties, were such as gave to him jurisdiction. And the fact that on the return day, the justice was absent from the town, did not take away his jurisdiction over the cause, which had been legally commenced. The statute sustained the powers of the court, preserved the action alive, authorized future proceedings, and directed the manner of them. The justice, therefore, having before him a cause, as it appeared from the face of the process and proceedings, of which he had jurisdiction, had, as a matter of course, jurisdiction over all interlocutory acts legally necessary to a final judgment. It would seem to follow from these premises, if they are true, that the finding of the justice, that the parties were duly notified, is conclusive evidence of its truth. The supreme court of the United States, in the case of *Voorhees v. The United States Bank*, 10 Pet. 472, in discussing this subject, says: "There is no principle better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from their initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

If this doctrine is applicable to the present case, of which there can be no doubt, the consequence is irresistible, that the fact of notice having been adjudicated, must be taken to be true, without referring to the evidence upon which the adjudication was predicated. The justice, by his record, says, the parties were duly notified; by which is meant, that they were notified, in the manner prescribed by law. This is the obvious meaning of the language used. This the justice had a right to inquire after, and to find as an essential fact; and in doing so, he must be presumed to have acted right. This principle has been often recognized, even when applicable to tribunals of special and

limited powers: *Service v. Heermance*, 1 Johns. 91; *Frary v. Dakin*, 7 Id. 75.

It was claimed for the defendant, in the argument, that a justice's court in this state is one of special and limited jurisdiction, and could not justify its proceedings at all, unless upon the face of them every fact appeared, which was necessary to confer jurisdiction. We are not persuaded that it is necessary for the determination of this case, that we should look after and decide the precise distinction between courts of general and courts of limited jurisdiction, or whether a justice's court be the one or the other. For if we are correct in the opinion already expressed, that Justice Adams, in this case, had jurisdiction from the commencement of this suit, which was not foregone, by his absence on the return day of the writ; then the principle, which the defendant would derive from this claim, has no application here.

If by a court of general jurisdiction, is meant one of unlimited powers, then we have none such in this state; nor do we know of any elsewhere. And if by a court of limited jurisdiction, is meant one whose powers are subordinate to some other court; then all but courts of *dernier ressort*, are of this character. Such is not the sense in which this subject has been understood, either in England or in this country. We think that a court of record proceeding according to the common law of the land, and whose judgments may be revised by writ of error, is a court whose proceedings and judgments import verity, and until reversed, will protect all who obey them; and in this respect, there is, in this state, no distinction between courts of justices of the peace and the county and superior courts. In this sense, the courts of common pleas of New Jersey, Massachusetts, Vermont, and Ohio, have been considered as courts of general jurisdiction: *Kempe's Lessee v. Kennedy*, 5 Cranch, 173; *Wheeler v. Raymond*, 8 Cow. 311; *Harrod v. Barretto*, 1 Hall, 155; *Tobias Watkins' case*, 3 Pet. 193; *Voorhees et al. v. The United States Bank*, 10 Id. 474; *Belts v. Bagley*, 12 Pick. 572; *Foot v. Stevens*, 17 Wend. 483; *Watson v. Watson*, 9 Conn. 144 [23 Am. Dec. 324]; *Hall v. Howd*, 10 Id. 514 [27 Am. Dec. 696]. Between all these courts and mere special tribunals, such as commissioners on insolvent estates, committees, military tribunals, and many others, which are not courts of record, and are established for some special and perhaps temporary purpose, there exists a very marked distinction in regard to the credit and sanction to which their proceedings

are entitled, and the immunities, which may be claimed by themselves, and such as act under them.

The form of making up the record of judgments in this state, may be, in some respects, variant in different counties; but we believe it is not usual that courts of record set forth the manner in which the service of process has been made. Generally, nothing more definite appears, than that the "writ has been duly served and returned, and entered upon the docket of the court." It is true, however, that in most cases, the original process, with the officer's return of service, accompanies the record, by reference to which the evidence and mode of service appears. Yet neither the original nor any intermediate process, nor the indorsement or attestation of service, constitutes in truth any part of the record of the court, in any sense in which records are understood to import verity. They prove nothing more than their own existence, except so far as the facts stated in them are established, by the finding of the court, either directly, or by reference to them. Even the officer's return of service affords only *prima facie* evidence of the facts therein stated.

It is not unfrequent that, as in the present instance, orders of notice have been made pending an action, or bill in chancery; but we do not think that such orders, or the evidence of their service, have uniformly made a part of the files of the court; nor are we prepared to say, that it is essential they should, so long as the court finds and sets forth upon its record that legal notice has in fact been given.

2. By suffering a default, the defendant admitted a debt to be due to the plaintiff. There being no defense interposed, and no issue formed, there was no fact necessary to be found, by the court, to enable the plaintiff to recover something. The assessment of damages was all that remained to be done: 11 Petersd. Abr. 644; 1 Swift Dig. 783. The assessment of damages after default, in England, as well as in some of our sister states, is made by a jury upon a writ of inquiry, or by a reference to the clerk or prothonotary. By our law, damages in such cases are assessed by the court; and this has been done in the present case. The court, by its records, says: "It is considered that the plaintiff recover five dollars damages," etc. We see no objection to this assessment, even in point of form.

We think there is nothing erroneous in the judgment of the justice; and are, therefore, of opinion that the judgment of the superior court should be reversed.

In this opinion the other judges concurred. Judgment reversed.

Cited in *Lyon v. Alvord*, 18 Conn. 73, upon the point that it is to be presumed that a court acted correctly, and at page 89, that this presumption applies as well to inferior as superior courts. Also in *Douglass v. Wickwire*, 19 Id. 492, that the record of a justice of the peace imports verity as well as those of higher courts. And in *McNamara v. Rogers*, 36 Id. 206, that justices' courts in Connecticut exercise a part of the common law jurisdiction of the state, and are recognized courts of the state.

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CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE.

RICE v. SIMMONS.

[2 HARRINGTON, 417.]

WRITTEN SLANDER, TO BE ACTIONABLE, must impute something which tends to disgrace a man, lower him in, or exclude him from society, or bring him into contempt or ridicule; and the court must be able to say from the publication itself, or such explanation as it may admit of, that it does contain such an imputation, and has legally such a tendency.

MERE GENERAL ABUSE AND SCURRILITY, however ill-natured and vexatious, is not actionable, whether written or spoken, if it does not convey a degrading charge or imputation.

A PUBLICATION, TO BE LIBELOUS, NEED NOT CONTAIN a direct and open charge, but if, taking the terms in their ordinary acceptation, it conveys a degrading imputation, however indirectly, it is a libel.

WHERE AN ALLEGED LIBEL CONTAINS ANYTHING THAT IS OBSCURE, or needs explanation to give it the force of slander, the pleader should point it by innuendo or prefatory averment.

WORDS WHICH, WHEN USED, DO NOT OF THEMSELVES, or by the connection in which they are used, convey an evil import, should be connected by averments with such a state of facts as would show that they contain a slanderous imputation.

ACTION on the case for a libel. The case came before the court of errors and appeals sitting in bank, upon a question reserved by the superior court of New Castle county. Whether a certain written paper published by the defendant was libelous upon its face, was the question reserved. The paper is given in full in the opinion. The lower court held the paper to be libelous on its face.

Wales and J. A. Bayard, for the plaintiff.

R. H. Bayard, for the defendant.

By Court, HARRINGTON, J. The question reserved in this case presents some interesting points of consideration in the law of libel, the more interesting because of the novelty of this action in our courts. Actions on the case for verbal slander have been of more frequent occurrence; in the trial of which, the principles relating to that form of slander have been investigated, and to some extent settled. But the law governing civil actions for written slander has few precedents in the judgments of our courts; and on many points, the principles which are to govern our decisions, do not rest upon any authoritative adjudication in this country.

Going back, then, to the common law fountain, if we are to yield to the weight of learned opinions, or recognize the force of adjudged cases, we must assent to the distinction (regretted though it has been by high authority, and argued against, as having no foundation in reason or expediency) between spoken and written slander. The same words which may be spoken with impunity, without subjecting to legal responsibility, may be actionable if written and published. So frequent and uniform have been the decisions founded on this distinction, that Sir James Mansfield yields to it, though reluctantly, in *Thorley v. Lord Kerry*, 4 Taunt. 365, as established by some of the greatest names known to the law, including Lord Hardwicke, Hale, Chief Justice, Holt, and others. The reasons by which this distinction has been vindicated are, that written slander is much more extensively and permanently injurious to character than verbal, being more widely circulated; that it is, therefore, more aggravated and dangerous, as tending to breaches of the peace; and that the deliberation necessary to prepare and circulate a written slander, evinces greater malice in the slanderer, and is worthy of stricter punishment. But to these reasons it has been answered, that the first may or may not be true, according as the slander may have been spoken or the libel published, as the former might, under circumstances, be circulated more extensively than the latter; and that the two last reasons have no application to the question, as neither the tendency to a violation of the peace nor malice is the foundation of a civil action, which is merely for damages for the wrong done to reputation by the slander.

Assuming the distinction, however, to exist; the question is, to what extent does it go? It was conceded in the argument, that actionable words must be such as to impute a punishable crime, or infectious disorder; such as tend to injure a person in

his office, trade, or business; or such as produce special damage. Words of general abuse, however opprobrious, and however vexatious, do not form the subject of an action of slander, unless they may bring the party charged in danger of criminal punishment, exclude him from society, deprive him of his office, or of the profits of his trade or occupation, or actually do him other special damage. Thus, to call a man "forsworn;" or a "scoundrel;" or a "cheat;" or a "rogue;" or a "rascal;" or a "swindler," have been considered not actionable, because the words do not necessarily import punishable crimes: 3 Wils. 177;¹ 6 T. R. 691;² 2 H. Bl. 531;³ 4 Co. 16 b;⁴ 2 Ch. 657. But in written slander it is different; and it was conceded on the part of the defendant in the argument of this case, that a publication affecting character may be libelous, though it do not impute a punishable crime. Yet it was insisted that it must impute a specific offense, or other moral delinquency; that mere scurrility or general abuse is no more actionable when written than if spoken; and even granting that it has a greater tendency to provoke a breach of the peace, this does not make it any more the subject of a civil action, though it may merit consideration on an indictment for the public offense. On the other side, it has been contended, that whatever is a libel for the purpose of criminal prosecution, is so for the purpose of a civil action, and that any publication which tends to degrade or disgrace a man, to lower him in the estimation of his fellows, or make his condition in society uncomfortable, to bring him into contempt or ridicule, is a libel.

I do not see much difference between these positions. Any written slander upon a man's reputation which tends to disgrace or degrade him among his fellow-men, or even to induce an ill opinion of him, is a libel; but how can anything be supposed legally to have that tendency, unless it impute some offense or moral delinquency? I throw out of view now, cases of libeling by signs or pictures, cases of mere ridicule (though it would be difficult to suppose a libel of this kind, which did not convey some specific imputation), and confine myself to the case of a slander on character or reputation effected by a written publication; and to the question whether mere general abuse or scurrility, not imputing any specific offense or delinquency, legal or moral, can amount to a libel.

Mr. Starkie's general definition of slander is "any false, ma-

1. *Onslow v. Horne*.
2. *Holt v. Scholefield*.

3. *Savile v. Jardine*.
4. *Davis v. Gardiner*.

licious, and personal imputation effected by writings, pictures, or signs, and tending to alter the party's situation in society for the worse:" Stark. on Sland., 140, c. 5. According to Mr. Chitty, "a libel signifies any malicious defamation, expressed either in printing, writing, pictures, or effigies. Every written calumny is actionable and punishable, although it do not impute any indictable offense, but merely tend to disgrace or ridicule or bring into contempt the party calumniated, even by imputing hypocrisy or want of proper feeling, and still more if it impute fornication, swindling, or any other deviation from moral rectitude or principle: 1 Chit. Gen. Pr. 43. From which it is to be collected as the understanding of these respectable authors, that a direct imputation or charge of a punishable crime was necessary to sustain an action for verbal slander, and that an imputation of some offense, or at least of something that would degrade or lower a man in public estimation, was equally necessary to sustain an action for written slander.

The case of *Robinson v. Germyn et al.*, 1 Price Exch. 11, turned expressly upon this point, and was decided on the ground that there was no express imputation of moral delinquency, though it must be admitted that the publication was insulting and vexatious. The plaintiff was a clergyman, officiating as such at the place of publication, and the defendants posted this notice in the room of a certain public society: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." It was averred to have been done maliciously, to insult and degrade the plaintiff, so being such minister, and to cause it to be suspected and believed that he was a person unfit to be associated with; but the court held it no libel. Graham, baron, said "he could not agree to extend the doctrine of words being libelous in writing which are not so in speech. It should, in all cases, be clearly shown that the words contain a libel. Though words conveying dark insinuations should not be suffered to escape, they must, in all cases, admit of a clear and obvious sense, and the declaration should point their meaning by innuendo. It is not enough that the consequences of words uttered be probably injurious to character, if the terms do not show such probability to the court." Wood, baron, said "the paper is no libel unless some imputation appear. If an imputation be expressly charged by words, it would be sufficient to state the

words. If they are ambiguous, an innuendo is necessary, or a special averment." The other judges concurred.

It is true that some of the definitions of slander by writers of authority, and many of the adjudged cases, do not lay particular stress on the necessity of such express imputation; but it will be found, on examining the authorities, that the cases in fact contain such imputation, from which I conclude that it is fairly embraced within the meaning of these definitions. Thus Selwyn defines a libel to be "a malicious defamation, expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule:" 2 Wh. Selw. 795. And he cites the case of *Villers v. Mansley*, 2 Wils. 403, and the definition of Chief Justice Wilmot: "If any man deliberately or maliciously publishes anything in writing concerning another, which renders him ridiculous or tends to hinder mankind from associating or having intercourse with him, an action lies against such publisher." But upon examining the case out of which this last definition in fact grew, and which is cited as the authority for Selwyn, it will be found to have contained a direct imputation of a contagious disorder. And it is to be remarked, that this libel, which was a scurrilous publication in doggerel poetry, contained much general abuse that was not noticed either in the argument or in the judgment of the court, which was made to rest on the direct imputation that the plaintiff had the itch; as to which the chief justice said he could see no difference between this and cases of leprosy and the plague, because either of them tended to exclude a man from society.

Chief Justice Parsons, in *The Commonwealth v. Clap*, 4 Mass. 163 [3 Am. Dec. 212], defines a libel to be "a malicious publication, expressed either in printing, writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." The case in which this definition was given, was an indictment for the following publication: "Caleb Hayward is a liar, a scoundrel, a cheat, and a swindler;" upon which no question could have arisen on the point now under consideration, as the libel charged not merely moral obliquity, but legal offenses.

Chancellor Kent, 2 Kent Com. 17, adopts this definition of Chief Justice Parsons, and adds that "expressions which tend to render a man ridiculous, or lower him in the esteem and

opinion of the world, would be libelous, if printed, though they would not be actionable if spoken." And he cites *Villers v. Mansley*, before referred to; and *Woodard v. Dowsing*, 2 Man. & Ry. 74; 17 Com. L. 292.¹ That was an action for a libel on the plaintiff, as overseer of the poor. It was moved in arrest of judgment, that the paper did not convey any imputation which could make it the subject of the action. Lord Tenterden, C. J., said, that being a case of written slander, whatever tends to bring a party into public hatred and disgrace is actionable. And he asks: "Can any man read this libel without saying it charges the plaintiff with oppressive conduct?" Bailey, J.: "The libel charges a breach of duty and oppression." The other judges concurred. This, therefore, was clearly a case directly imputing to the plaintiff oppression of the poor and violation of official duty, on either of which grounds it was actionable.

No inference against the position taken can, therefore, be made from the fact that definitions of high authority do not in terms require the imputation of a specific offense, since they do not exclude the necessity of such imputation; and the cases in which they arise, or upon which they are founded, are all cases where such a charge or imputation manifestly appears. It remains for me to inquire whether any case has been cited, or can be found, of a different character.

In *Bell v. Stone*, 1 Bos. & Pul. 331, a letter written to a third person calling plaintiff a villain, was held actionable. It was remarked in the argument in reference to this case, that villain was a word of very uncertain signification, and did not with all men, necessarily imply any offense: that one man regarded another as a villain, who did not pay his debts; and another, referring to the original meaning of the word, one who was in subjection, or owed service to another. But I apprehend that there is no popular or common signification attached to that word, reconcilable with honorable and fair standing, and that the imputation of villainy is necessarily a charge of dishonesty or other gross moral turpitude. It can not be true, that in the opinion of any man he who does not pay his debts, if from misfortune or other innocent cause he is unable to pay them, is a villain; while he who will not pay his debts though able, can not be regarded as an honest man; and the written charge of such villainy would in my opinion, amount to a libel; because the inevitable effect would be to degrade him in society.

1. See 17 Com. L. 701.

Brown v. Croome, 3 Com. L. 353;¹ 2 Stark. 297, was cited for the plaintiff. That was the case of an advertisement charging a bankrupt with fraudulent preference of certain creditors, and calling a meeting of his creditors generally. There was no question but that the imputation was libelous, the only question being whether the advertisement was not authorized by the occasion and object, and *Delany v. Jones*, 4 Esp. 191, was referred to on this point, but Lord Ellenborough, interrupting the counsel, distinguished that case from this, by saying, "in that case the publication did not assert anything of bigamy;" that is, it contained no direct libelous imputation.

The case referred to is very strong on the point under consideration. The declaration stated that the defendant, intending to charge the plaintiff with the crime of bigamy, made this publication: "Ten guineas reward. Whereas, by a letter lately received from the West Indies, an event is stated to be announced by a newspaper that can only be investigated by these means: this is to request, that if any printer or other person can ascertain that James Delaney, esq., some years since residing at Cork, late lieutenant in the north Lincoln militia, was married previous to nine o'clock in the morning of the tenth of August, 1799, they will give notice to — Jones, No. 14 Duke street, St. James', and they shall receive the reward." And there was an innuendo that the defendant meant thereby to insinuate and be understood, that the plaintiff was a married man at the time he married his present wife. The defense was: 1. That the publication was justifiable; and 2. That by its terms no direct slander was conveyed, without which there could be no libel. Lord Ellenborough charged the jury, that they must be of opinion that the paper carried an imputation that the plaintiff was guilty of bigamy, as that meaning was necessary to make the paper a libel at all. The defendant had a verdict.

The case cited of *McCorkle v. Binns*, 5 Binn. 340 [6 Am. Dec. 420], was adjudged to be a libel, because it charged the plaintiff with infamous falsehoods, for which he had been deprived of a participation in the chief ordinance of the church to which he belonged; and in the case mentioned, but not read, of *Lord Churchill v. Hunt*, 18 Com. L. 139,² the libel charged the plaintiff with attending a public ball on the very evening of the day on which, by his furious and careless driving, he had caused the death of a young lady. There was other libelous matter in the

1. See 2 Com. L. 417.

2. See 18 Com. L. 263; S. O., 1 Ohlt. 480.

narr, and the case went off on a question of pleading. The syllabus assumes that "written slander is in general actionable when it imputes defects in moral virtue," a position that requires other support than the authority referred to, of *Thorley v. Lord Kerry*, 4 Taunt. 355, where the charge was, that the plaintiff, "under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods." Sir James Mansfield, in delivering the opinion of the court, said: "There is no doubt that this was a libel for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule."

A great number of cases might be cited to the same effect, and I have not been able, in the course of my examination, to find any that seems to conflict with the principle assumed, unless it be the case in 3 Salk. 226,¹ and the one therein cited. The point of this latter case can not be understood from the reference, nor can I find any report of it. What "riding sky-mington" was is not known at this day; it seems to have been a charge against a husband, probably a violation of some of the marital duties; at all events, a grievous charge, for which the husband had an action. As to the case in Salkeld, the language of the court obviously goes further than the case itself; for though Chief Justice Holt said that scandalous matter was not necessary to make a libel, but it was enough if the defendant induced an ill opinion to be had of the plaintiff, or made him contemptible and ridiculous, the libel he had under consideration charged the plaintiff with a want of loyalty and patriotism, if not with treason; and it was laid as matter of special damage that he lost his election to parliament on account of it. He was charged with having declared, that "he could see no end to the war with France, unless the young gentleman on the other side of the water (innuendo, the prince of Wales) be restored;" and the court said, "every man understands what is meant by the young gentleman on the other side of the water."

I am not sure that this case is reconcilable with the principle which I have supposed to govern all the cases; but no one can investigate the law of libel without feeling an invincible repugnance to admit in their full extent some of the old cases. Indeed, Mr. Justice Lawrence, in *Woolnoth v. Meadows*, 5 East,

1. *Cropp v. Tilney*.

468, says, that "many of the old cases on slander went to a very absurd length." It can not be that we are bound to run into the same absurdities; that at this day, and in this country, the opinions of black-letter judges, however learned; the judgments of star-chamber courts, so often subservient to state purposes; and the whole law of slander, *scandalum magnatum* and all, must, in the absence of legal enactments, be regarded by our courts as the law of this state; without considering the great advances that civil liberty has made throughout the world, and that the liberty of speech and of the press is now a very different thing from what it was in the ages from which these precedents are drawn.

On the whole, I regard it as a principle of the common law, to be collected if not from all the cases, at least from all that at this day, and in this country, can be recognized as authority; that written slander, to be actionable, must impute something which tends to disgrace a man, lower him in, or exclude him from society, or bring him into contempt or ridicule; and that the court must be able to say from the publication itself, or such explanations as it may admit of, that it does contain such an imputation, and has legally such a tendency. That mere general abuse and scurrility, however ill-natured and vexatious, is no more actionable when written than spoken, if it do not convey a degrading charge or imputation. Against all such attacks, a man needs no other protection than a good character; and the law will not suppose that damage can happen to such a character from the pointless arrows of mere vulgarity.

It is not intended by this, that to make a publication libelous it must contain a direct and open charge; nor can this principle be used as a protection to covert and insidious slander. The publication must be judged of by its general tenor; and if, taking the terms in their ordinary acceptation, it conveys a degrading imputation, however indirectly, it is a libel. As was said in *Peake v. Oldham*, Cowp. 275, "where words from their general import appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them." Thus, in the manuscript case of *Ward v. Reynolds*, cited by Lord Mansfield, the defendant said to the plaintiff, "I know you very well; how did your husband die?" The plaintiff answered, "As you may, if it please God." The defendant replied, "No; he died of a wound you gave him." On not guilty pleaded, there was a

verdict for the plaintiff; and on motion in arrest of judgment, the court held the words actionable, because from the whole frame of them they were spoken by way of imputation.

A stronger illustration is furnished by the case of *Woolnoth v. Meadows*, 5 East, 463, which was an action of slander, and the question was, whether a crime was imputed by these words: "His character is infamous. He would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him and hunt him from all society. If his name is enrolled in the Royal academy, I will cause it to be erased and will not leave a stone unturned to publish his shame and infamy; delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me." It was strenuously urged, that here was no specific imputation of a crime, but the court held otherwise, saying that they must understand them as all mankind understood them, and it would be impossible for a number of persons, indifferently assembled, not to agree that these words imputed an unnatural crime. With this qualification, and so understood, the principle which limits actions for libel to such publications as impute some moral offense, or other degrading charge, is not liable to be abused for the protection of the slanderer, while at the same time it confines the action within reasonable limits. Without it we are afloat: everything is a libel that offends a man's pride or wounds his feelings. Without it the action is not confined to slanders which may produce injury to character or personal standing, but embraces everything that is scurrilous or abusive.

By this principle I proceed to examine the publication for which the present action is brought; inquiring, not whether it was an unkind and unneighborly act on the part of Simmons; calculated, perhaps designed, to wound the feelings of Rice, and excite his anger; but whether it charges him with anything which this court can say tends to degrade him as a man or as a merchant, or to injure his reputation or character.

I remark, in the first place, that if the alleged libel contains anything that is obscure or needs explanation to give it the force of slander, the pleader should point it by innuendo or prefatory averment. If the words used do not of themselves, or by the connection in which they are used, convey an evil import, they should be connected by averments with such a state of facts as would show that they contain a slanderous imputation. If this be not done, the inference will be that it could not be

done consistently with the truth; and if the words be innocent in themselves, they must be taken to be innocent in their bearings. I am not to be understood as expressing the exploded doctrine of taking words *in mitiori sensu*, nor as supposing that an innuendo can enlarge the meaning of words; the language used must be construed in its ordinary sense; but it may have a connection with facts which would give it a very different coloring, and by proper averments capable of proof, its connection with such facts may be shown, and its true meaning presented. Thus one of the charges in this case is, that Rice had endeavored to put in claim against Simmons certain grain receipts which Simmons had once paid and taken up. This may or may not have been dishonest in Rice. Put in claim; how? Grain receipts; to whom payable? If originally due to Rice himself, and he brought suit on them after they were paid, it would be a charge of dishonesty; and even if he had sued upon them, knowing that they had been paid, it might be considered as dishonorable; but suppose they were payable to another, and had come to Rice's possession *bona fide*, and for a valuable consideration, without any knowledge, or even suspicion, that they had been paid, it would be no imputation on Mr. Rice's honesty or honor to say that he had put them in suit. It was for the plaintiff to explain by his averments, in what way the putting such papers in suit or claim was dishonest or dishonorable. But when we know, as we do, from the trial of the cause, that no other averment could have been made consistently with the truth, than that these were grain receipts, appearing on their face to be due to a Mrs. Cleland, and that the only act of putting them in claim by Rice was the sending them as lost papers to the person who appeared to be the lawful owner, we are not surprised that there is no averment giving this charge a darker coloring than its terms import. I recur, therefore, to the terms of the publication; and to the inquiry whether it presents, on its face, any degrading imputation, and what that imputation is.

The whole publication is as follows: "The public are hereby cautioned against receiving from Washington Rice or John Agness, a black man, any papers relative to my business, as sundry papers hath been purloined from my store and fell into the hands of said W. Rice, who hath endeavored to put some of them in claim against me; viz., bills and receipts for grain I had bought and paid for, which was returned to me by the holders when their crop was delivered and I paid for it."

There is an innuendo in the declaration that the defendant intended to charge Rice with having endeavored to use these papers, knowing them to have been stolen; undoubtedly if this be so, it is a libel; but I think the paper will not bear this construction, as the receipts are stated to have fallen into Rice's hands after they were purloined, and there is nothing which charges him with a knowledge of their having been stolen, when he attempted to collect them. Having fallen into his hands without such knowledge, I do not think there is necessarily an imputation against character in the charge that he had endeavored to put them in claim. The meaning is not clear; but take it to be that he had brought suit upon them, it is still capable of a good or a bad signification; it might be dishonest or it might be lawful and right. There is no rule of construction that authorizes us to give the preference to either sense; but, as the plaintiff is bound to make out his case, if the words do not on their face convey a libelous imputation, and he does not show by his averments that they have that meaning, he must fail. Upon this charge, therefore, if it stood alone, I should not feel justified by the principles that govern the action, to pronounce this a libel; but there is other matter in this publication which conveys to my mind more clearly a degrading imputation, and such as was calculated to injure the plaintiff's character.

The publication asserts that these grain receipts, or due bills, had been taken up and paid by Simmons; that they had been purloined from his store and "fell into" the hands of Washington Rice, who had endeavored to put some of them in claim against him: all this I have supposed was not libelous, because as it does not assert the knowledge on the part of Rice, either that the bills had been paid or stolen, it does not necessarily charge him with anything wrong, in attempting to put them in suit; but the paper proceeds to hold Mr. Rice up before the public and to caution them against him as a man, who after having endeavored to collect some of these due bills out of the debtor himself, would be guilty of passing them off on the public, and of using such an agent as John Agness, the black man, for this purpose. If this imputation be cast by the publication, it seems to me there can not be any doubt that it is a libel according to settled principles; and it is clear to my mind that such is the fair meaning of the words used. Indeed, the only hesitation I have had in placing my judgment on this

ground, is the fact, that it did not, on the argument, seem to strike others with the same force.

Does the paper authorize this reading? and if so, does it not convey a libelous imputation, by holding Mr. Rice up as a man who would be guilty of dishonest conduct, and by placing him in a degrading connection and association? It is true, that we have nothing to do with the character of John Agness, though that would have been material had it been averred in the declaration to be as degraded as it was stated to be in the argument; but the publication calls him a black man, and as such we are bound to notice him as the associate or agent of Mr. Rice, in the act against which it was thought necessary to caution the public. Am I right in saying the paper presents Agness as the associate or agent of Rice, in passing off these bills? I think it does make him the agent. It does not state that any of the purloined papers fell into Agness' hands, but cautions the public "against receiving from Washington Rice, or John Agness, a black man, any papers relative to my business, as sundry papers hath been purloined from my store and fell into the hands of said W. Rice." Whatever papers were purloined are stated to have fallen into Rice's hands, and the caution against receiving these papers either from Rice or Agness, I think, without any strained construction, presents the latter as the agent or instrument of the former, in putting off these bills. Then what is the charge implied in the caution as to Rice but that, after endeavoring to enforce these evidences of debt against Simmons, he would attempt to put them off on the public, either personally or by the agency of another? I consider this as representing Mr. Rice to be a dishonorable, if not a dishonest man. The gist of the imputation is, that Rice, after endeavoring to enforce these claims, would be guilty of putting them off on the public; the suit against Simmons necessarily disclosed that these bills had all been paid off and afterwards stolen; and, even if they came lawfully to Rice's hands, he could not, as an honest man, afterwards attempt to pass them on the public as obligatory and valid evidences of debt. Yet the publication holds him up as a man capable of attempting this, and thus denounces him as a dishonest man.

I do not examine whether such a caution to the public might have been justified as a protection to Simmons against subsequent holders of these due bills; that question has been tried by the jury, and they have found that there was no necessity arising

out of any supposed liability to pay these bills again, for him thus to go out of his way to slander the plaintiff.

I am aware also, that it may be said that this is making out a libel by argument or inference; but it must be remembered, that though the law requires the imputation of something that will dishonor or degrade a man, or lessen his standing in society, it does not require that such imputation should be in express terms, nor does it afford any countenance or refuge for covert and insidious slander. If it did so, it would extend but little protection to reputation. The character of a libel is to be judged of by the effect it produces on the mind; it does not always happen; and, when the slanderer writes in the fear of the law, it will not often happen; that you can at once put your finger on the libelous matter, and the attempt to show in what it consists may depend much on inferential reasoning; while yet the impression may be distinct on the mind of every reader, and all the damage result to character that would arise from a plain and direct charge.

On the whole, I am satisfied that this publication does contain a libelous imputation on Mr. Rice's reputation and standing, and my opinion is, that judgment should be entered for the plaintiff.

LAYTON, J. I concur in the general views of Judge Harrington, as to what constitutes a libel; and that an imputation of some offense, or a charge of the want of some moral principle, which tends to degrade the individual, must be fairly deducible from the publication. The application of his reasoning to the writing under consideration is, I think, rather too confined. I consider this publication libelous in other respects than that particularly pointed out. The language used is to be taken in its ordinary sense.

Judge BLACK concurred. He had drawn up an opinion at length, but declined delivering it, as he came to the same result with Judge Harrington. He was not disposed to confine so strictly to the necessity of a special imputation.

Chief Justice J. M. CLAYTON. At the trial, the inclination of my opinion was, that the publication did not contain a libel; and I think now it is only libelous on the single point, and for the reasons presented by Judge Harrington. I concur, therefore, in the result of that opinion, and in its reasoning generally.

The Chancellor concurred generally. Judgment for plaintiff.

LIBEL, WHAT IS.—A publication of the truth from good motives, and for justifiable ends, is not a libel, even though it reflect upon the government: *Respublica v. Dennie*, 2 Am. Dec. 402. As to what words constitute a libel, see *McCorkle v. Binns*, 6 Id. 420; *Stow v. Converse*, 8 Id. 189.

TRUTH, AS JUSTIFICATION, AND IN MITIGATION: See *Commonwealth v. Olap*, 8 Am. Dec. 212; *Commonwealth v. Morris*, 5 Id. 515; *Remington v. Congdon*, 13 Id. 431; *Commonwealth v. Blanding*, 15 Id. 214.

WORDS ACTIONABLE PER SE GENERALLY: See *Gilman v. Lowell*, 24 Am. Dec. 104, and cases in this series there cited.

INDEX TO THE NOTES.

ADVERSE POSSESSION by tenant against landlord, 607.

under contract of purchase, 607.

AGENT, acquiring property for his principal can not claim it for himself, 258.

ANIMALS, dangerous, are nuisances, 310.

dangerous, liability for keeping, 310.

joint action for injuries done by, 312.

APPORTIONMENT defined, 517.

jury may make when parties can not agree, 517.

of an entire contract not decreed, 519.

of contracts by courts of equity, 512.

of contracts for services, 519.

of contracts generally, 518.

of dividends, 522.

of ground rent on opening street, 517.

ASSIGNMENTS FOR CREDITORS, assignee can not destroy by refusing to accept, 657.

exactng releases, 657.

preferences, when valid, 657.

ATTACHMENT, receptor not estopped to claim property, 64.

ATTORNEY'S LIEN, attaches at entry of judgment, 758.

defined, 755.

extent of, in United States, 756.

general, 759.

how lost, 759.

kinds of, 755.

particular or charging, 755.

payment to avoid, 756.

to what extends, 755, 759.

waiver of, 759.

whether extends to fees, 758.

AWARD, error of judgment no ground for vacating, 673.

misconduct of arbitrators, 673.

BOUNDARIES, monuments control course and distances, 154.

COMMON CARRIERS, dangers of sea, what are, 751.

delivery, where and to whom must be made, 302.

fire, contract exempting from liability for, 556.

fire, liability for, 555.

fire, liability for, act of congress concerning, 555.

fire, liability for, when originates elsewhere, 555.

- COMMON CARRIERS**, general liability of, 554.
inevitable accident, liability for loss by, 555.
usage to control liability of, 751.
who are, 751.
- CONFLICT OF LAWS**, law of *situs*, when controls, 271.
lex loci, when controls, 270.
where mortgage is made in one state and is payable in another, 270.
- CONSTITUTIONAL LAW**, abolishing private corporation and transferring its effects, 112.
bounds of legislative power, 112.
control over public corporations, 112.
- CONTRACTS**, agreements to stifle prosecutions for felony, 600.
agreements to stifle prosecutions for misdemeanor, 601.
apportionment of, 758.
in restraint of trade, 122.
parol enlargement of time of performance, 140.
performance, excuse of by accident, 140.
refunding money received under, 521.
- CONVEYANCE**, of what grantor shall die seized of, is a will, 585.
- COVENANTS**, concurrent action on, 194.
- CRIMINAL LAW**, false pretenses, what indictable, 306.
- CRIMINAL PROSECUTION**, agreement to stifle or discontinue, 600-604.
- DAMAGES**, measure of, for non-performance of contract, 285.
measure of, for refusing to make a lease, 285.
- DECLARATION**, in support of one's own title, not admissible, 197.
- DECREE**, final when, 274.
- DEDICATION**, of land to public use, 188.
- DEED**, acknowledgment before justice out of county where he resides, 541.
acknowledgment, parol evidence of what took place at, 541.
tender of, who must make, 277.
- DEFINITION**, of act of God, 555.
of apportionment, 517.
of lien, 755.
- DIVIDENDS**, apportioning, 522.
- DOWER**, deed of wife, when sufficient to bar, 431.
devise of maintenance held to be in lieu of, 237.
- EMINENT DOMAIN**, abandoning proceedings to condemn property, 375.
compensation formerly not allowed for roads, 373.
compensation, limitation of time to apply for, 375.
compensation, mode of obtaining, is subject to legislative control, 375.
compensation must be in money, 375.
compensation must be provided for in advance, 375.
compensation need not precede occupation for survey, 374.
compensation, postponing till levy of tax, 374.
compensation, tribunal to determine amount of, 375.
compensation, when need not precede taking, 374.
compensation, when property is taken directly by county, state, or nation, 374.
entry, when may be made, before payment of compensation, 373.
existence of highway does authorize use of lands for railroad, 372.

- EMINENT DOMAIN**, franchise may be taken, 372.
 may be exercised in behalf of railroad, 372.
 payment, how must be provided for, 372.
 power of, may be exercised in behalf of private corporation or person, 372.
 power of, must be exercised only for public uses, 372.
- EVIDENCE**, demurrer to, what admits, 535.
- EXECUTION** against municipal corporation may be levied on private property, 166.
 amending return, 166.
 exemption of cloth from wool of sheep, 156.
 exemption of cow of non-resident, 156.
 husband's estate as tenant by curtesy is subject to, 261.
 levy, waiver of, 489.
- FIRE**, carrier's liability for loss by, 554.
- FORFEITURE OF RIGHTS** by not complying with contract within time specified, 278.
- GIFT OF PRODUCT OF FUND** is a gift of the fund itself, 448.
 specific performance of, when decreed, 493.
- HIGHWAY**, action by private person for obstruction of, 133.
 dedication of, when presumed, 150, 188.
- INFANT**, conveyance by, transfers legal title, 295.
 disaffirmance of deed by, what is a, 295.
 mortgage by, is not disaffirmed by conveying same land, 295.
- INKEEPER** may exclude disorderly persons, 213.
- JUDGMENT** against tenant to the *præcipe* bars remainder-man, 435.
 collateral attack on, not allowed, 481.
 final, when, 274.
 lien of, attaches to actual rather than apparent interests, 256.
 lien of, on surplus after foreclosure, 256.
- JURY**, discharge of, when entitles accused to release, 598.
 irrelevant instructions to, 40.
 separation of, as a ground for a new trial, 576.
- LAW**, difference between ignorance and mistake of, 396.
- LETTERS PATENT**, description, certainty required, and reasons for, 205.
 description must distinguish new from old, 205.
 specification, ambiguity renders patent void, 206.
 specification, liberally construed, 205, 206.
 specification required of inventor, 204.
 void for claiming too much, 205.
 void for errors in specification, 205.
- LIEN** defined, 755.
 of attorneys, its nature and scope, 755-759.
- MANSLAUGHTER**, killing committed from timidity, 56.
- MARRIED WOMAN**, deed of, to bar dower, 431.
 deed of, void at common law, 295.
 deed of, where she joins with attorney of husband, 431.

- MARRIED WOMAN**, deemed a *feme-sole*, when, 513.
estoppel from conveying with warranty, 446.
gift to separate use of, 502.
husband presumed to consent to business conducted by, 535.
judgment against, 513.
- MINOR**, earnings of, when entitled to, 119.
- MISDEMEANOR**, agreements not to prosecute for, 600-604
- MUNICIPAL CORPORATION**, execution against, levying on property of citizen, 166.
liability for torts of officers, 161.
- NUISANCE**, ferocious dog is, 310.
prosecution for, may be compounded, 604.
restraining in equity, 715.
- PARTNERSHIP**, admission of partner after dissolution, 416.
lands purchased by, how held, 411.
profits, sharing in, whether makes one a partner, 382.
- PERFORMANCE** of covenant, when excused as impossible, 707.
vendor not in default for not demanding, 277.
- POWER** coupled with interest can not be revoked, 508.
intent of donor controls construction of, 508.
naked, may be revoked, 508.
- PROMISSORY NOTE**, when received in due course of trade, 589.
- PUBLIC NUISANCE**, action by private person for, 132.
damages entitling private person to action, 132.
health of family as a ground for proceeding against, 133.
may also be a private one, 134.
obstructing highways, 133.
- PURCHASER** first acquiring possession obtains precedence, 40.
of defective title, takes the risk on himself, 457.
- RECORDING**, obtaining precedence by, 283.
- REMAINDER** in personal estate is void if tenant for life be given absolute power of disposal, 583.
- SALE**, delivery sufficient to pass title to chattels, 59.
retention of possession after, 450.
separation and delivery of articles essential to consummation, 450.
- SCHOOLMASTER** exercises judicial functions in imposing punishments, 419.
liability of, for punishing pupils, 419.
power to punish pupils, 419.
- SET-OFF** in favor of mortgagor, 270.
- SHERIFF**, recitals in deed of, statute requiring, is directory, 437.
- STATUTE OF FRAUDS**, promise to pay the debt of another, 614.
- SUNDAY**, contracts made on, 465.
- SURETY**, right of, to reach fund set apart by principal, 264.
subrogating to rights of creditor, 264.
- TIME** is essence of contract, when, 278.
- TRANSFER**, fraudulent, administrator may have it set aside, 484.
fraudulent, binds party making, 484.

TRESPASS, possession by servant does not preclude owner from maintaining.
489.

TRUST, adoption and enforcement by one having no prior interest, 256.
property purchased in contravention of, 256.

TRUSTEE, liability for neglect, 581.
liability for misapplication of funds by co-trustee, 581.

USAGE, as to delivery by carrier, 303.

VENDEE, forfeiture by failure to perform acts in time, 278.
time, when essence of his contract, 278.

WIFE, judgment against husband, effect on her estate, 261.
terms on which equity will aid husband to obtain possession of property
of, 260.

WILL, deed purporting to convey what grantor shall die seized of, 585.
devise, when carries the fee, 502.
land devised to be sold may be taken as land or money, 502.
land devised to be sold, when judgment binds, 502.

INDEX.

ABANDONMENT.

See INSURANCE, 2, 4, 5.

ACKNOWLEDGMENT.

ACKNOWLEDGMENT BY A SHERIFF, AFTER THE EXPIRATION of his term, of a deed executed while in office, is good, as having relation back to the time of execution. *Doe, Lessee of Foster, v. Executors of Dugan*, 432.

See MARRIED WOMEN, 10, 11, 12, 13, 14.

ACTIONS.

See CONSPIRACY; CONTRACTS, 8, 9, 11, 12; CONTRIBUTION; GUARDIAN AND WARD, 1; INFANCY, 3; MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5; NUISANCE, 3, 4, 5; REMAINDERS AND REVERSIONS, 3, 4; TRESPASS; TROVER.

ADMINISTRATORS' SALES.

See EXECUTORS AND ADMINISTRATORS, 3, 4, 5.

ADVERSE POSSESSION.

See CO-TENANCY, 2.

AGENCY.

1. **AGENT DRAWING A BILL IN HIS OWN NAME**, without stating that he acts as agent, is personally liable thereon, notwithstanding a request to charge to a particular account, and although the payee knows him to be an agent, except where he contracts in behalf of the government. *Newhall v. Dunlap*, 45.
2. **CHARACTER IN WHICH AN AGENT ACTS IN DRAWING A BILL** MAY BE SHOWN as between himself and his principal, though he may be personally liable to third persons. *Id.*
3. **MASTER OF A VESSEL HAS NO POWER OF BUYING AND SELLING**, incident to his office as master, and where he is authorized by a letter of instructions to draw bills for the purpose of making purchases for cargo, he is agent or factor, and not as master, in drawing such bill.
4. **MASTER OF A VESSEL IS NOT PERSONALLY LIABLE** for cargo purchased by him with a letter of instructions from the owner, made, by reason of its being drawn in his name, to be charged to the cargo of his vessel, and owner's death. *Id.*

5. **THOUGH THE MASTER OF A VESSEL DEPARTS FROM THE STRICT LETTER** of his instructions in drawing a bill for purchases for a shorter date than he is authorized, if the owner or his administrator claim the proceeds, he can not deny the agency. *Id.*
 6. **PRINCIPAL CAN NOT MAINTAIN REPLEVIN AGAINST AN AGENT** for goods upon which the latter has a lien, without discharging such lien. *Id.*
 7. **A PHYSICIAN UNDER WHOSE CARE** a man places his wife, some distance from his own residence, is presumed to have authority to do all such acts, and adopt such course of treatment and operations as are in his opinion necessary, without previously notifying the husband of an intended operation; nor need he prove to the satisfaction of the jury, that the operation was necessary, or that it would be dangerous to the wife to wait until her husband was notified. *McClallen v. Adams*, 140.
 8. **AGENT IS PERSONALLY LIABLE UPON HIS CONTRACTS**, as such, unless he can show authority to bind his principal. *Gillaspie v. Wesson*, 715.
- See BONDS, 1; MUNICIPAL CORPORATIONS, 6; TRUSTS AND TRUSTEES, 3.

ANIMALS.

See FEROCIOUS ANIMALS.

APPROPRIATION.

See EMINENT DOMAIN.

APPURTENANCES.

See DEEDS, 2.

ARBITRATION AND AWARD.

1. **AWARD, THE DECLARATION ON**, need only state so much of the award as is necessary to show plaintiff's claim. *Doolittle v. Malcom*, 671.
2. **AWARD IS MUTUAL IF IT DIRECTS THE PAYMENT OF A SPECIFIC SUM** by one party to another without directing the latter to execute a release, or do any other act. *Id.*
3. **AWARD OF PAYMENT OF A SUM OF MONEY**, written on the back of the arbitration bond, must be taken to settle all the matters therein submitted. *Id.*
4. **CONDUCT OF ARBITRATORS CAN NOT BE IMPEACHED** by plea alleging that they made their award without hearing all the legal and pertinent evidence offered relative to the matter in dispute, or that they decided the matter upon their own personal knowledge concerning it. *Id.*

ARREST.

1. **ALTERATION OF A WARRANT OF ARREST** after it has finally left the hands of the magistrate issuing it, by another magistrate, before whom it is returnable, by his addition of the name of a person against whom it shall run, is illegal, and the warrant will not justify the arrest of such person. *Haskins v. Young*, 426.
2. **WARRANT MUST DESCRIBE WITH CERTAINTY** the persons whose arrest it requires, and where the recitals of a warrant state an offense to have been committed by "A. B. and company," and thereupon the warrant commands the arrest of "said company," the description is too uncertain to justify an arrest. *Id.*

3. **ARREST IS CONSTITUTED** where there has been submission to an authority over one's person asserted by virtue of a pretended warrant. *Id.*

ASSIGNMENTS.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS** may lawfully give preference to certain of their number. *Skipwith v. Cunningham*, 642.
2. **ASSIGNMENT EXACTING A RELEASE** of their demands by creditors, as a condition precedent to their sharing its benefits, is valid, if the assignment is of the whole of the debtor's property, and the fund so created is directed to be applied, *in toto*, in discharge of the debts due assenting creditors. *Id.*
3. **PROVISION IN AN ASSIGNMENT FOR BENEFIT OF CREDITORS**, that repayment shall be made to the assignor of the surplus left after the complete discharge of the debts of all assenting creditors, is void, in so far as it attempts to protect such surplus from the claims of the non-assenting creditors; but will not invalidate the assignment as to the assenting creditors. *Id.*
4. **CREDITORS LEFT UNSECURED BY AN ASSIGNMENT** are entitled to an account of the property, in order that it may be determined whether there is any surplus out of which to pay their indebtedness. *Id.*

See CONSPIRACY, 1, 2, 3.

ASSUMPSIT.

See CONTRIBUTION.

ATTACHMENTS.

1. **DECLARATIONS OF A SERVANT IN POSSESSION OF CHATTELS** attached for his debt that they are his property, are inadmissible against his master, in an action against the attaching officer. *Abbott v. Hutchins*, 59.
2. **OWNER OF CHATTELS IN POSSESSION CAN NOT MAINTAIN REPLEVIN** against an officer wrongfully attaching them as the property of a third person, though he has given a receipt promising to deliver them to the officer on demand, but not admitting property in the attachment debtor. *Lathrop v. Cook*, 62.
3. **RECEIPTOR OF PROPERTY ATTACHED** while in his possession as the property of another, may show in an action on the receipt that he is the owner, there being no admission to the contrary in the receipt. *Id.*

See EXEMPTIONS; LEVY; SHERIFFS.

ATTORNEY AND CLIENT.

1. **ATTORNEY FOR PARTY TO ACTION HAS NO AUTHORITY TO ASSIGN JUDGMENT** rendered therein for his client. *Boren v. McGehee*, 695.
2. **ATTORNEY MAY BE REQUIRED BY THE COURT TO SHOW HIS AUTHORITY** to represent the party for whom he appears. *Tally v. Reynolds*, 737.
3. **PARTY QUESTIONING ATTORNEY'S AUTHORITY** must show, by affidavits, facts sufficient to raise a reasonable presumption that he is acting without authority. *Id.*
4. **ATTORNEY WHOSE AUTHORITY IS QUESTIONED MUST SHOW** that he has been employed by the party for whom he appears; and where there is no evidence of such employment, he will not be permitted to prosecute the suit. *Id.*

5. AN ATTORNEY HAS A LIEN upon the judgment and execution of his client, as against the debtor, with notice, for his services and disbursements in the progress of the suit, which courts of law and equity will protect, subject to the equitable rights of others. *Andrews v. Morse*, 752.
6. WHERE AN ATTORNEY, HAVING OBTAINED A JUDGMENT in favor of his client, who had no other property, claimed a lien thereon for his fees and disbursements, and gave notice of such claim to the creditor and debtor, and subsequently the latter paid the judgment, regardless of the attorney's claim, the latter may, notwithstanding such payment, proceed with the execution against the debtor, to the extent of the fees and disbursements. *Id.*

See EQUITY, 3.

AWARDS.

See ARBITRATION AND AWARD.

BANKRUPTCY AND INSOLVENCY.

1. INSOLVENT DEBTOR HAS A LEGAL RIGHT to give a preference to one creditor over another. *Woodbury v. Bowman*, 40.
2. MONEY, NOTES, ETC., LEFT WITH A THIRD PERSON by an insolvent debtor, contemplating suicide, with a letter inside the bundle directed to one of his creditors, stating that they are to be appropriated to payment of his claims, and that if anything is left it is to go to the debtor's children, if delivered to the creditor by the person with whom they are left after the debtor's death, may be retained by such creditor as against the other creditors so far as necessary to satisfy his claims. *Id.*

BANKS AND BANKING.

See USAGE.

BILLS OF LADING.

See COMMON CARRIERS, 6, 7.

BONA FIDE PURCHASERS.

1. SUBSEQUENT PURCHASER FOR VALUABLE CONSIDERATION.—These words, when used in a statute, mean a subsequent *bona fide* purchaser for valuable consideration. *Van Rensselaer et al. v. Clark*, 280.
2. PURCHASER WITH ACTUAL NOTICE OF A PRIOR DEED acquires title subject to such deed, though his deed be first recorded. *Id.*
3. TWO CONVEYANCES FROM THE SAME GRANTOR being on record for the land, all purchasers are chargeable with constructive notice of each deed from the time that it is filed for record. Therefore, one who, after both deeds are recorded, acquires title under the second deed, though it be first recorded, is not protected from a prior deed, unless the grantee in the second deed had no actual notice of the first. *Id.*

See CONDITIONAL SALES.

BONDS.

1. BOND EXECUTED WITH BLANK FOR INSERTION OF ITS AMOUNT is not a deed, nor can it be made such by the filling of the blank, by an agent authorized by parol. *Davenport v. Sleight*, 420.

2. **BONDS WITH A WARRANT OF ATTORNEY** to confess judgment given to secure the purchase money of land, are but a personal security until judgment is entered upon them, and create no lien upon the land sold. *Brown v. McCormick*, 450.

See **ARBITRATION AND AWARD**, 3; **EXECUTORS AND ADMINISTRATORS**, 3; **GAMING**, 2; **RESTRAINT OF TRADE**; **SURETIES**.

BOUNDARIES.

1. **MONUMENTS CONTROL COURSES AND DISTANCES**, where there is a conflict in determining the land conveyed by a deed. *Frost v. Spaulding*, 150.
2. **IDEM.**—In a deed the land was bounded by a line running northerly to M.'s land, "thence south-easterly by said M.'s land thirty-eight and one half rods to a stump and stones;" by laying out the land between the two monuments, it would have a gore between it and M.'s land, and it was held that this gore did not pass by the deed. *Id.*
3. **INCONSISTENT BOUNDARIES IN DEED, WHICH ONE OF, RETAINED.**—Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing design manifested on the face of the deed, and the least certainty must yield to the greater certainty in the description. *White v. Gay*, 224.
4. **DIVISIONAL LINE BETWEEN DIFFERENT PROPRIETORS** of an entire lot, in possession of separate parcels thereof, is established by their acquiescence therein for fifteen years. *Beecher v. Parmele*, 633.
5. **SUCH LINE WILL BE CONSIDERED AS DRAWN THROUGH THE CENTER**, leaving the two parts as nearly equal and similar as possible, unless the parties manifest their acquiescence in a line drawn in some other way. *Id.*

BRIDGES.

See **CORPORATIONS**, 1.

CHILDREN.

See **DEVISES**, 11, 12, 13, 14.

COMMON CARRIERS.

1. **DELIVERY BY CARRIER MUST BE TO THE CONSIGNEE PERSONALLY**, unless some usage or agreement is shown to the contrary. *Gibson v. Culver and Brown*, 297.
2. **UNIFORM USAGE AND COURSE OF BUSINESS** on the part of the proprietors of a stage line, to leave goods at their stage-houses, to be called for by the consignees, may be proved to relieve them from liability for not delivering the goods to a consignee, nor giving him notice of their arrival. *Id.*
3. **COMMON CARRIERS ARE LIABLE FOR THE LOSS BY FIRE** of goods intrusted to them for transportation, though they are steam carriers and therefore obliged to use fire to propel their vehicles of transportation. *Administrators of Patton v. Magrath*, 552.
4. **CUSTOM TO IMPOSE A RESTRICTION** upon a general rule of law must be certain, reasonable, and of such general practice that the inference is fair that both of the contracting parties contracted with reference thereto. *Id.*

5. OWNERS OF A VESSEL TRANSPORTING GOODS FOR HIRE are common carriers, and are liable as such. *Crobsy v. Fitch*, 745.
6. BILL OF LADING wherein the "dangers of the seas" are excepted, does not limit or qualify the liability of ship-owners as common carriers. *Id.*
7. ACT OF GOD, INEVITABLE ACCIDENT, dangers of the sea, etc., are expressions of very similar import, and excuse a loss, whether they are repeated in a bill of lading or not. *Id.*
8. WHERE THE USUAL ROUTE OF VESSELS from New York to Norwich was through Long Island sound, the fact that navigation in the sound was obstructed by ice, was held not to justify a vessel in departing from that route, and going upon the open sea to the south side of Long Island, but that such departure amounted to a deviation without reasonable necessity, and made the owners liable for a loss occasioned by dangers of thesea. *Id.*
9. WHETHER THERE HAS BEEN A DEVIATION or not is, upon given facts, a question of law for the court to determine. *Id.*
10. WHERE THE USUAL ROUTE for vessels bound from New York to Norwich is through Long Island sound, no usage for such vessels to perform their voyages on the south side of Long Island, when the navigation of the sound is obstructed by ice, will justify the master of a vessel, bound on such a voyage, in taking the latter course during such obstruction, instead of waiting in New York until the usual navigation becomes free, unless such usage is general, and of so long a standing as to have been generally known. *Id.*
11. WHERE A PERSON WHO SHIPPED GOODS upon board of a vessel for transportation, upon being informed of the course of the voyage taken, effected an insurance of the goods shipped, and, after a loss, demanded payment of the policy, neither such insurance, nor demand of payment, is any evidence of the consent or acquiescence of the shipper in the course of the voyage. *Id.*

COMPOUNDING CRIMES.

See CONSIDERATION, 1, 4, 5.

CONDITIONAL SALES.

1. PURCHASE FROM CONDITIONAL VENDEE OF CHATTEL.—Where a contract for the sale of a chattel is entered into, and the property is delivered upon condition that the title shall not pass until payment in certain installments shall be fully made, but that the vendee in the mean time is to have possession, the vendor giving a bill of sale making no mention of the condition, and stating that he warrants the property free from "incumbrances and that he has received payment by notes," and the purchaser giving back a written acknowledgment containing a full statement of the conditions of the bargain, this constitutes a conditional sale, and the title remains in the vendor until payment; and if the transaction is free from fraud, a subsequent *bona fide* purchaser from the vendee before the condition is complied with, having no notice of the condition, but relying on the bill of sale, gets no title as against the conditional vendor, and is liable in trover after a demand. *Lane v. Borland*, 33.
2. IF SUCH TRANSACTION BE REGARDED AS A SALE AND MORTGAGE back, the mortgage must nevertheless prevail against a *bona fide* purchaser from the mortgagor in possession, though he has no notice of the mortgage. *Id.*

See SALES, 1.

CONFLICT OF LAWS.

1. CONSTRUCTION AND VALIDITY OF PERSONAL CONTRACTS depend on the laws of the place where they were made, unless they were entered into with the view of being performed elsewhere. *Chapman v. Robertson et al.*, 264.
2. TRANSFER OF LANDS OR OTHER HERITABLE PROPERTY, and the creation of liens thereon, is governed by the laws of the place where such property is situate. *Id.*
3. LEX LOCI REI SITÆ also determines whether the property is to be considered as real or heritable. *Id.*
4. PLACE OF PAYMENT IS PRESUMED to be where obligee resides or is found. *Id.*
5. MORTGAGE VALID BY THE LAWS OF THE PLACE where the lands are situated, and where it was executed, can not be avoided because it conflicts with the usury law of the country where the mortgagee resides, and where the money is payable. *Id.*
6. A CREDITOR, UPON A LOAN OF MONEY MADE IN NEW YORK, may stipulate for the highest rate of interest permitted by our laws, though such rate is higher than that sanctioned by the law of the place where payment is to be made. *Id.*
7. LEX LOCI CONTRACTUS DETERMINES THE NATURE AND CONSTRUCTION of a contract, unless such contract is made with a view to performance in another place. *Baxter v. Willey*, 623.
8. TITLE TO LAND IS DETERMINED BY THE LAW OF THE PLACE WHERE IT IS SITUATED. *Id.*

CONSIDERATION.

1. PROMISSORY NOTE, THE CONSIDERATION OF WHICH IS COMPOUNDING OF A PENALTY, or the suppressing of a criminal prosecution, is void. *Town of Hinesburgh v. Sumner*, 599.
2. CONSIDERATION, PROMISE OF INDEMNITY, WHEN VOID FOR WANT OF.—Where one for whom another is surety procures a third person to sign a promise of indemnity to such surety, and there is no new consideration for such promise, and it is not made in pursuance of any contract entered into at the time of the original contract, the promise to indemnify is void for want of consideration. *Rix v. Adams and Throop*, 619.
3. PROMISE TO REMAIN SURETY FOR ANOTHER FOR INDEFINITE TIME is not sufficient consideration for a promise to indemnify such surety. *Id.*
4. FUGITIVE FROM JUSTICE, WHO, BEING ABOUT TO BE ARRESTED and surrendered in obedience to the laws of Vermont, pays money and other property to the party aggrieved, for the purpose of compounding and stifling the prosecution, can not recover back such money or property. *Dixon v. Olmsted*, 629.
5. BOTH PARTIES ARE, IN SUCH CASE, IN PARI DELICTO, and the law will not aid either. *Id.*

See CONTRACTS, 9, 10.

CONSPIRACY.

1. WHERE TWO PERSONS CONSPIRE with a third to defraud the latter's creditors, and in pursuance thereof take an assignment of his property and aid him in leaving the state, they are liable in an action upon the case to such creditors. *Mott v. Danforth*, 468.

INDEX.

ABANDONMENT.

See INSURANCE, 2, 4, 5.

ACKNOWLEDGMENT.

ACKNOWLEDGMENT BY A SHERIFF, AFTER THE EXPIRATION of his term, of a deed executed while in office, is good, as having relation back to the time of execution. *Doe, Lessee of Foster, v. Executors of Dugan*, 432.

See MARRIED WOMEN, 10, 11, 12, 13, 14.

ACTIONS.

See CONSPIRACY; CONTRACTS, 8, 9, 11, 12; CONTRIBUTION; GUARDIAN AND WARD, 1; INFANCY, 3; MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5; NUISANCE, 3, 4, 5; REMAINDERS AND REVERSIONS, 3, 4; TRESPASS; TROVER.

ADMINISTRATORS' SALES.

See EXECUTORS AND ADMINISTRATORS, 3, 4, 5.

ADVERSE POSSESSION.

See CO-TENANCY, 2.

AGENCY.

1. **AGENT DRAWING A BILL IN HIS OWN NAME**, without stating that he acts as agent, is personally liable thereon, notwithstanding a request to charge to a particular account, and although the payee knows him to be an agent, except where he contracts in behalf of the government. *Newhall v. Dunlap*, 45.
2. **CHARACTER IN WHICH AN AGENT ACTS IN DRAWING A BILL MAY BE SHOWN** as between himself and his principal, though he may be personally liable to third persons. *Id.*
3. **MASTER OF A VESSEL HAS NO POWER OF BUYING and selling**, incident to his office as master, and where he is authorized by a letter of instructions from the owner to draw bills for the purpose of making purchases for such owner, he acts as agent or factor, and not as master, in drawing such bills. *Id.*
4. **MASTER OF A VESSEL HAS A LIEN** upon property purchased by him with the proceeds of a bill drawn under a letter of instructions from the owner, upon which he is personally liable, by reason of its being drawn in his own name, though directed to be charged to the cargo of his vessel, and this lien is not divested by the owner's death. *Id.*

CORPORATIONS.

1. **BRIDGE CORPORATION IS LIABLE FOR AN INJURY** occasioned to the horse of a passenger over such bridge by defects in the way leading thereto from the public highway which it has adopted as part of said bridge, where it is required by the statute under which it is incorporated to keep the bridge in repair. *Watson v. Proprietors of Lisbon Bridge*, 49.
2. **CORPORATION MAY BE PRIVATE**, though its charter contain provisions of a public character, introduced solely for the public good, as a general police regulation of the state. *Regents of the University of Maryland v. Williams*, 72.
3. **POLICE OR SANITARY REGULATION IN THE CHARTER** of a medical institution, providing for the examination and licensing by such institution of persons seeking to practice medicine, and for the payment of a fee therefor, and imposing a fine for practicing without such license, creates no vested right in the corporation which will prevent a repeal of such regulation. *Id.*
4. **CORPORATION AGGREGATE IS AN ARTIFICIAL INTELLECTUAL BEING**, the mere creature of the law, composed generally of members acting in their natural capacity, but it may be composed of persons acting in a political capacity as members of other corporations. *Id.*
5. **ACT OF 1812, CREATING THE CORPORATION** of the "Regents of the university of Maryland," did not destroy or merge in it the corporation of the "Regents of the college of medicine," existing under the act of 1807, but both continue as separate and distinct corporate bodies, with unimpaired rights and franchises, their respective powers being entirely compatible. *Id.*
6. **PUBLIC CORPORATION IS ONE CREATED FOR POLITICAL PURPOSES** and with political powers, to be exercised for the public good in the administration of civil government, and is subject to the control of the legislature. *Id.*
7. **CORPORATION OF "REGENTS OF THE UNIVERSITY,"** etc., is not a public corporation. *Id.*
8. **SUBSEQUENT ENDOWMENT** of a private eleemosynary corporation by the state does not constitute it a public corporation. *Id.*
9. **AUTHORITY TO RAISE MONEY BY A LOTTERY** does not constitute an endowment of such an institution. *Id.*
10. **CORPORATION ESTABLISHED FOR A PUBLIC END** is not necessarily a public corporation. *Id.*
11. **GOVERNMENT HAS NO RIGHT, WITH RESPECT TO ELEEMOSYNARY CORPORATIONS**, to inspect, regulate, or control them or their funds and franchises as it has in the case of public corporations, but that power resides in the visitors. *Id.*
12. **INCORPORATED COLLEGES AND ACADEMIES**, endowed with property by public or private donation, are private eleemosynary corporations, and of this character is the corporation of "Regents of the university." *Id.*
13. **REGENTS OF THE UNIVERSITY OF MARYLAND ARE THE VISITORS** of that corporation. *Id.*
14. **OFFER OF AN ACT AMENDING THE CHARTER** of a corporation, for the acceptance of such corporation, is implied without express words, in the passage of the act; but where the act abolishes the corporation and

transfers its franchises to another, there is nothing for the corporation to accept. *Id.*

15. **ASSENT OF A CORPORATION TO AN ALTERATION OF ITS CHARTER** may be inferred, without any written instrument or vote, from acts demonstrative of such assent. *Id.*
16. **ACTS FROM WHICH SUCH ASSENT WILL BE INFERRED** must be corporate acts, acts of the corporation or of its authorized officers or agents, and the unauthorized acts or declarations of individual members of the corporation, in taking positions under the new act, or the like, furnish no evidence of such assent. *Id.*
17. **NON-USER OR MISUSER** of corporate franchises has never been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared. *Id.*
18. **SURRENDER OF CORPORATE FRANCHISES** is not to be presumed from non-user; that can only be effected by deed to the state. *Id.*
19. **ASSENT TO ACT DISSOLVING CORPORATION** will not be presumed from mere non-user of its franchises. *Id.*
20. **RESIGNATION OF AN OFFICE** in a corporation may be made either by express agreement between the officer and the corporation, or by an implied agreement from his being elected to another office incompatible with it. *Id.*
21. BY "ANOTHER INCOMPATIBLE OFFICE" is meant another office in the same corporation. *Id.*
22. **TAKING A SITUATION UNDER A VOID CHARTER** or act of incorporation is not a resignation of a situation in another existing corporation. *Id.*
23. **THE FACT OF INCORPORATION HAVING BEEN SHOWN**, the burden of showing a dissolution of the corporation rests upon those who wish to establish such dissolution. *Id.*
24. **A CORPORATION IS COMPOSED** of distinct, definite integral parts, where each faculty consists of a definite number of men; and to constitute a corporate meeting, the attendance of a majority of the members of each class is necessary. *Id.*
25. **NON-USER OR MISUSER ON THE PART OF A CORPORATION** can not be taken advantage of in a collateral action. *Id.*

See CONSTITUTIONAL LAW, 2, 3, 4, 5; EVIDENCE, 2; MUNICIPAL CORPORATIONS; PLEADING AND PRACTICE, 2, 3; WITNESSES, 1.

CO-TENANCY.

1. **PURCHASE AT EXECUTION SALE BY ONE CO-TENANT** of the estate of the other, is valid, and raises no resulting trust in the purchaser in behalf of the vendor. *Baird v. Baird's Heirs*, 399.
2. **EXCLUSIVE POSSESSION OF ONE TENANT IN COMMON**, under a conveyance of his co-tenant's estate, though the conveyance is ineffectual, added to the fact that he notoriously claims the whole estate in severalty, constitutes an adverse possession which length of time will ripen into indefeasible title. *Id.*
3. **PARTNERS ARE JOINT TENANTS**, and not tenants in common, of lands purchased with partnership funds. *Id.*
4. **ONE TENANT IN COMMON CAN NOT CONVEY A PORTION OF HIS INTEREST** in the common estate by metes and bounds; the conveyance in such case

should be of an aliquot portion of the tenant's entire interest. *Smith v. Benson*, 614.

5. LEVY OF EXECUTION ON PART OF INTEREST OF ONE TENANT IN COMMON, made upon such tenant's entire interest in a portion of the estate, described by metes and bounds, is void. *Id.*

See DOWER, 5; PARTITION.

COVENANTS.

1. NON-PERFORMANCE OF AN EXPRESS COVENANT can be excused only by showing that its performance is unlawful, or has been rendered impossible by the intervention of causes beyond human control. *Morrow v. Campbell*, 704.
2. PERFORMANCE OF AN EXPRESS COVENANT IS NOT EXCUSED by the fact that subsequent lawful acts of third persons have rendered it impossible. Thus, where a sheriff who has seized property of an execution debtor, in the hands of a third person, agrees with the latter that he will give him possession of the property on his paying the amount of the execution, the sheriff is not excused by the fact that the levy of subsequent executions upon the property has rendered it impossible for him to deliver possession. *Reid v. Edwards*, 720.

MARRIED WOMEN, 3.

CRIMINAL LAW.

1. EVIDENCE OF DECEASED'S VIOLENT CHARACTER ON INDICTMENT FOR MANSLAUGHTER.—Evidence is inadmissible in favor of one on trial for manslaughter, that the deceased was addicted to drink, and was a quarrelsome and dangerous man when under the influence of liquor, although it appears that he had been drinking on the day of the killing, where there is no evidence of provocation or excuse for the killing. *State v. Field*, 52.
2. OBTAINING CHARITABLE DONATION BY FALSE PRETENSES and misrepresentations is not indictable. *People v. Clough*, 303.

See JURY; LIBEL, 1, 2, 3, 4, 5, 6, 7; NUISANCE, 1.

CURTESY.

See DEVISES, 1, 4.

DAMAGES.

1. MEASURE OF DAMAGES FOR THE LOSS OF A HORSE whose death was caused by a defect in the defendant's bridge, includes not merely the value of the horse, but moneys prudently expended in attempting to cure him. *Watson v. Proprietors of Lisbon Bridge*, 49.
2. SPECIAL DAMAGES ARISING FROM BREAKING UP AN ESTABLISHMENT and moving with family and furniture to other premises which the defendant had agreed to lease to plaintiff, may, though not specially alleged, be recovered, in an action for refusing to deliver possession and make the lease. *Driggs v. Dwight*, 263.
3. MEASURE OF DAMAGES FOR NOT GIVING A LEASE, is the actual value of the bargain plaintiff has made, and is not confined to the difference between the rent agreed to be paid and the actual value of the rent. *Id.*

4. DAMAGES IN EJECTMENT CAN NOT BE RECOVERED unless there is a recovery of the land. *Smith v. Benson*, 614.

See CONSPIRACY, 3; SET-OFF, 2.

DANGERS OF THE SEA.

See COMMON CARRIERS, 6, 7, 8.

DECLARATIONS.

See ATTACHMENTS, 1; EVIDENCE, 3, 4, 5; PARTNERSHIP, 7.

DECREE.

See PLEADING AND PRACTICE, 8, 9.

DEDICATION.

1. HIGHWAY MAY BE DEDICATED in Massachusetts by consent of the owner and acceptance by the public. *Hobbs v. Lowell*, 145.
2. DEDICATION MAY BE PRESUMED from circumstances from which the consent of the owner of the soil may be inferred. *Id.*
3. TO RENDER THE PUBLIC LIABLE FOR INJURY ON DEDICATED HIGHWAY, whether formal acceptance by public necessary, *quære?* *Id.*
4. ACCEPTANCE BY PUBLIC ARISES where the municipal authorities do not punish the obstruction of an old highway, and the people use the new one. *Id.*
5. DEED OR WRITTEN GRANT IS NOT NECESSARY to establish dedication of commons or highways to public use; nor is it necessary that there should be a grantee in existence, to take the fee out of which the incorporeal hereditament is to arise, at the time of the supposed dedication. *Vick v. Mayor and Aldermen of Vicksburg*, 167.
6. INTERESTS OF THOSE BENEFICIALLY ENTITLED TO EASEMENTS or dedications of a public, charitable, or religious character, are not allowed to lapse or fail for want of what is technically called a person to take the legal title; but the public, in whose favor the strict rules applied to like transactions between individuals are relaxed, must be a material party to the act out of which its interest is supposed to arise. *Id.*
7. PARTIES ARE AS NECESSARY TO A DEDICATION as to a private grant. *Id.*
8. ACTS OF PROPRIETORS WITHIN INHABITED CITIES and villages of established boundaries, by which a dedication is established, must be, either in themselves, or from the relations of the parties, of an open, palpable, deliberate, and public character. *Id.*
9. NO PARTICULAR FORM IS NECESSARY in dedication of land to a public use; the assent of the owner, and the fact of its being used for the purpose intended, are all that is required. *Id.*
10. MERE INTENTION OF PROPRIETOR OF URBAN LANDS to dedicate them to a public use do not amount to a dedication thereof, nor are his strictly private acts or declarations to be regarded as evidence of such dedication. *Id.*
11. PUBLIC, COMPOSED OF INDIVIDUALS WHO COME IN BY ACTS OF DISSEISIN and intrusion, subsequent to a dedication of urban property by the owner, can not be regarded as the objects of his bounty and regard. *Id.*

See NUISANCE, 1.

DEEDS.

1. IN THE INTERPRETATION OF DEEDS AND INSTRUMENTS in writing, courts are bound to effectuate the intention of the parties, if it can be done consistently with the rules of law. *Frost v. Spaulding*, 150.
 2. DESCRIPTION IN CONVEYANCE, EFFECT OF.—A description in a conveyance, in these words: "A certain tenement, to wit, one half of a corn-mill, situated in Washington, in lot No. 1, with all the privileges thereto belonging," is sufficient to pass the mill, the land on which it stands, and such water privileges as are necessary to the use of the mill. *Gibson v. Brockway*, 200.
 3. TERM LOT, WHEN USED UNQUALIFIEDLY, MEANS a lot in a township, as duly laid out by the original proprietors, especially if it is said to be a lot in a certain range or right. *White v. Gay*, 224.
 4. REPUGNANT CLAUSE IN DESCRIPTION, WHEN REJECTED.—Where an estate is clearly and explicitly described in a deed, and a subsequent clause is added as further descriptive of it, but which is of doubtful import, or repugnant to the first clause, such latter description will be rejected. *Id.*
 5. DELIVERY OF PROPERTY IS CONSTITUTED BY SUCH ACTS as transfer the right of dominion and control over it, and therefore delivery of a deed authorizing the exercise of dominion and control over property is equivalent to a delivery thereof. *Gilmore v. Whitesides*, 563.
 6. NO DELIVERY CAN BE HAD OF A DEED SUBSEQUENT TO THE DEATH of the grantor, though the latter has placed it in the hands of an agent with instructions to deliver after his death. *Id.*
- See ACKNOWLEDGMENT; BONA FIDE PURCHASERS, 2, 3; BOUNDARIES; CO-TENANCY, 2, 4; FRAUDULENT CONVEYANCES, 2, 6, 7; GIFTS, 5; HUSBAND AND WIFE, 1, 5; INFANCY; MARRIED WOMEN, 1, 2, 3, 10, 11, 12, 13, 14; NOTICE; REAL ESTATE, 3; RECORDING; RESCISSION, 2; VENDOR AND VENDEE, 2.

DELIVERY.

See COMMON CARRIERS, 1, 2; DEEDS, 5, 6; FRAUDULENT CONVEYANCES, 1, 3; GIFTS, 5.

DEVIATION.

See COMMON CARRIERS, 8, 9, 10.

DEVISES.

1. TESTATOR'S INTENTION TO DEPRIVE DEVISEE'S HUSBAND of his estate by the curtesy, must clearly appear from the will, or it will not be allowed, and the fact that he devises to his daughter a farm, with the limitation that it shall not be "subject to the sale or disposal of her husband in any way, manner, or form whatsoever," is not sufficient to show that he intended to bar the tenancy by curtesy, when the husband was, at the time of the testator's death and for several years previous, in the occupation and possession of the premises. *Mullany v. Mullany*, 238.
2. TESTATOR CAN NOT BY WILL CREATE AN ESTATE which, by the rules of the common law, he could not in his life-time create by deed. *Id.*
3. ONE WHO DEVISES FREE-SIMPLE ESTATE PARTS with all the interest he had, and will not be permitted to say that such estate shall not be subject to all the restraints imposed upon it by law. *Id.*

4. **TESTATOR WHO DEVISES TO FEME-COVERT AN ESTATE IN FEE** can not deprive her husband of his estate by the curtesy, by any words of restraint or limitation in the will. *Id.*
5. **CONSTRUCTION OF DEVISE** "unto my daughters, to be equally divided between them share and share alike, and to be to them for and during their natural life, and after their death then to be to their and each of their children, and to be divided between them, share and share alike," must be such as to give each daughter a life estate, with remainder to their children as tenants in common, the children taking *per stirpes*, not *per capita*. *Bool v. Mix*, 285.
6. **A DEVISE OF ALL THE ESTATE** of a person to his wife, to act with it according to her own discretion, consistent with the welfare of the children of the deceased, and in event of her marriage "she shall then claim no greater a right to my estate than one of the least of my surviving children," vests in her the entire estate during her widowhood in trust for herself and children, and upon her marriage the trust ceases, and she becomes entitled to an equal share of the estate, in common with her children. *Walker v. Quigg*, 452.
7. **PROCEEDS OF REAL ESTATE BEING DEVISED**, the devisees may elect to take the fund either as land or as money. *Smith v. Starr*, 498.
8. **DEVISE TO USE OF A., WITH POWER OF DISPOSITION BY WILL**, and in default of will, then to her daughter, vests in A. an absolute estate in fee. *Id.*
9. **A RESTRICTION INCONSISTENT WITH A GENERAL POWER OF DISPOSAL** is inoperative. *Id.*
10. **IF A DEVISE BE MADE TO A. IN TRUST FOR B., A MARRIED WOMAN**, for her separate use and not liable to her husband's contracts or control in any manner whatever, a conveyance made by A. and B., after the death of the latter's husband, and while she is a *feme-sole*, is valid, and passes an absolute, indefeasible title. *Id.*
11. **UNDER A DEVISE TO A. FOR LIFE, AND AT AND FROM HIS DECEASE** to his children and their heirs and assigns, the distribution is not to take place till his death, and must be to such children as survive him. *Thompson et al. v. Garwood et al.*, 502.
12. **A DEVISE TO CHILDREN GENERALLY, NOT LIMITED TO ANY PARTICULAR PERIOD**, includes those children only who are living at the death of the testator. *Id.*
13. **A DEVISE TO ONE FOR LIFE, AND THEN TO HIS CHILDREN**, will include all his children up to the time of his decease, whether born after the decease of the testator or not; and whenever the distribution among children is postponed to any particular period by a will, all the children will be included who are in existence when such period arrives. *Id.*
14. **A DEVISE TO EXECUTORS TO HOLD IN TRUST**, to permit R. K. F. to receive the rents and profits for life, and at and from his decease to convey to his children, their heirs or assigns, makes it obligatory on the trustees to convey to such children as R. K. F. may have at the time of his decease. Hence he is not entitled to a conveyance of the legal estate on the ground that the only children which he had at the date of the will and of the death of the testatrix have since deceased, leaving him their sole heir. *Id.*

See DOWER, 1, 2, 3; EXECUTORS AND ADMINISTRATORS, 1; LEGACIES AND LEGATEES; REAL ESTATE, 1.

DOGS, INJURY BY.

See FEROCIOUS ANIMALS.

DOMICILE.

1. **ATTAINING AGE OF TWENTY-ONE IS NOT IPSO FACTO EMANCIPATION**, in respect to the question of settlement; so long as the child remains single, enters into no contract inconsistent with the idea of his being a member of, and in a subordinate situation in his father's family, acquires no settlement for himself, and makes his father's house his home, no matter what his age may be, he will follow any newly acquired settlement of his father. *Overseers of Alexandria v. Overseers of Bethlehem*, 229.
2. **IDIOT LIVING WITH HIS FATHER MAY DERIVE A SETTLEMENT**, no matter what his age may be. *Id.*

DONATIO CAUSA MORTIS.

See GIFTS, 5.

DOWER.

1. **DOWER—DEVISE, WHEN REGARDED AS MADE IN LIEU OF.**—Where a testator bequeaths to his wife one room in his dwelling-house, and a comfortable maintenance out of his real estate during her life or widowhood, and then devises to his two sons all his real estate, to be equally divided between them, such bequest to the wife will be regarded as made to her in lieu of her dower. *White v. White*, 232.
2. **DEVISE IN LIEU OF DOWER** need not be expressly declared to be such in a will, if the intention to make it so be apparent, and the claim of dower would be inconsistent with its other provisions. *Id.*
3. **WIDOW TO WHOM DEVISE OF REAL ESTATE IS MADE IN LIEU OF DOWER** must, within six months after the probate of the will, dissent from such devise, or she will be barred of her action for dower. *Id.*
4. **RELEASE OF DOWER MUST BE BY DEED**, and therefore a parol release is not sufficient to bar an action of dower. *Id.*
5. **RELEASE OF DOWER IN ONE MOIETY OF A FARM** will not release it in the other moiety; nor will a release to one tenant in common for his share release it to another tenant in common who has a different share. *Id.*

EASEMENTS AND SERVITUDES.

- A **SALE OF LAND BY A CITY** is made subject to the public easement of right of passage over the highways laid out thereon. *Stetson v. Faxon*, 123

EJECTMENT.

See DAMAGES, 4.

EMINENT DOMAIN.

1. **PUBLIC USE—RAILROADS.**—The legislature may authorize private property to be taken for the use of a railroad, upon the payment of just compensation. *Bloodgood v. Mohawk and Hudson R. R. Co.*, 313.
2. **RIGHT OF EMINENT DOMAIN MAY BE EXERCISED** by the government directly, as through the acts of its officers, or indirectly, as through corporations or private individuals. *Id.*

3. **AMOUNT OF COMPENSATION NEED NOT BE ASCERTAINED** and paid before private property can be appropriated to a public use, if a certain and adequate remedy is provided by which such compensation can be obtained without unreasonable delay. But the legislature can not authorize such appropriation where no remedy exists by which the owner can procure compensation. *Id.*
4. **TO JUSTIFY AN ENTRY UPON LAND** and the construction of a railroad thereon, the defendants must plead that the damages were regularly assessed and paid before they proceeded to appropriate the land to the alleged public use. *Id.*
5. **WHEN A STATUTE PROVIDES THAT COMPENSATION** shall be paid for lands appropriated to a public use, without designating the time of payment, it must be so construed as to make the payment a condition precedent to the appropriation. *Id.*
6. **JUST COMPENSATION** means a fair equivalent in money. It must be paid when the property is taken, or within a reasonable time thereafter; and its payment must not depend on any hazard or uncertainty. *Per Senator Maison. Id.*
7. **COMPENSATION FOR LANDS TAKEN FOR A PUBLIC USE** may be assessed by commissioners. The persons whose lands are taken are not entitled to an assessment by a jury. *Per Senator Maison. Id.*
8. **RIGHTFUL ATTRIBUTES OF SOVEREIGNTY** with respect to private property considered by Senator Tracy. *Id.*
9. **PUBLIC USE**, and the agencies through which the power of eminent domain may be constitutionally exercised, considered by Senator Tracy. *Id.*

EQUITY.

1. **COURT OF EQUITY IS AS MUCH BOUND BY POSITIVE RULES** and general maxims concerning property, as a court of law. *Mullany v. Mullany*, 238.
2. **COURT OF EQUITY PROCEEDING IN THE SETTLEMENT OF AN ESTATE** will pass upon such incidental questions as what are the proper commissions of an executor, though these standing alone would not afford proper basis for its jurisdiction. *Newby, Ex'r of Layden, v. Skinner et al.*, 397.
3. **RELIEF IN EQUITY—REQUEST OF A DEFENDANT TO AN ATTORNEY TO REPRESENT HIS INTERESTS** in a chancery suit, brought to obtain an account from him in his capacity of executor, without accompanying the request with the vouchers and information necessary to enable the attorney to make a defense, will not entitle him to relief upon the ground of accident and surprise, against a decree obtained against him in the suit three years after the service of process, upon his showing that soon after his request to the attorney the latter died, without his knowledge, and without having done anything in the matter. *Callaway v. Alexander*, 640.
4. **EQUITY, PRIOR IN POINT OF TIME, WILL BE GIVEN THE PREFERENCE**, where a fund subject to several equities is sought to be reached. *Skipwith v. Cunningham*, 642.
5. **COURT OF EQUITY WILL GENERALLY RETAIN A CASE** of which it has once taken jurisdiction, until it has disposed of the whole subject; but it will not retain a case where the bill does not allege any specific ground of equitable relief. *Dugan v. Cureton*, 727.

See MISTAKE; SET-OFF; SPECIFIC PERFORMANCE; SUBROGATION.

ESTATES OF DECEDENTS.

1. **CREDITOR OF A DECEASED HEIR**, showing by petition filed in a suit brought by the children of such heir for a decree for the sale of the intestate ancestor's estate, and the distribution of the proceeds among the heirs, that he is a creditor of such heir for goods sold her while a *feme-sole*, and that she afterwards married and died, leaving no assets liable for the payment of her debts, makes a *prima facie* case, entitling himself to payment of his claim out of the share of the proceeds of the intestate's realty awarded to the deceased heir's children. *Hays v. Miles*, 70.
2. **WHEN AN HEIR HAS ALIENATED PART OF THE ESTATE** which has descended to him, and it becomes necessary to sell some part to pay the debts of the ancestor, the surrogate may order the unalienated part to be first sold. *Eddy v. Traver et al.*, 261.
3. **PERSONAL ESTATE OF A DECEASED PERSON** is the fund first liable for the payment of his debts. *Newby, Ex'r of Layden, v. Skinner et al.*, 397.
4. **DIRECTION THAT LANDS BE CONVERTED INTO MONEY** and the proceeds divided between certain persons, creates no charge upon the fund for the payment of debts; but the beneficiaries take as devisees, and their bequests will be liable for the testator's debts only after the exhaustion of the personal estate. *Id.*
5. **AN HEIR IS ENTITLED TO RECOVER INTEREST** upon his distributive share of the estate of the deceased when upon demand for such share the administrator does not offer to pay it, although no refunding bond is tendered until long after the death of the intestate. *Patterson v. Nichol*, 473.
See EQUITY, 2; EXECUTORS AND ADMINISTRATORS; SUBROGATION, 3.

ESTOPPEL.

See MORTGAGES, 1; REAL ESTATE, 2; STATUTE OF LIMITATIONS, 2.

EVIDENCE.

1. **EVIDENCE OF WHAT A DECEASED WITNESS SWORE** on a former trial of the same cause is admissible. *Watson v. Proprietors of Lisbon Bridge*, 49.
 2. **FACT THAT MEMBERS OF A BRIDGE CORPORATION WORKED ON THE ROAD** leading to the bridge from a public highway, is no evidence of the adoption of such road by the corporation as part of the bridge. *Id.*
 3. **WHERE VENDOR AFTER SALE DECLARES THAT HE HAS SOLD TO VENDER**, evidence of other declarations by him, contradictory of the former, and made at another time, and out of the presence of the vendee, is not admissible. *Wilson v. Woodruff*, 194.
 4. **DECLARATIONS OF PERSON WHILE IN POSSESSION OF LAND**, whether as tenant or proprietor, as to the manner in which the land was occupied, are admissible as against himself or those claiming under him. *Beecher v. Parmele*, 633.
 5. **SUCH DECLARATIONS MAY BE PROVED BY THE TESTIMONY** of persons other than the one who made them. *Id.*
- See ATTACHMENTS, 1, 3; BOUNDARIES, 4, 5; COMMON CARRIERS, 2, 4, 11; CRIMINAL LAW, 1; DEDICATION; MARRIED WOMEN, 6, 11; PARTNERSHIP, 7.

EXECUTIONS.

1. **ON AN EXECUTION AGAINST A TOWN OR PARISH**, the body or estate of an inhabitant may be lawfully taken to satisfy it. *Chase v. Merrimack Bank*, 163.

2. **CERTIFICATE OF MEMBERSHIP IN A PARISH IS NOT NECESSARY** in order to make one liable as an inhabitant where he has been voted a member, has attended the parish meetings, and has acted as a trustee of the ministerial fund. *Id.*
 3. **EXECUTION CAN NOT BE LEVIED** upon the property of one who, though a member of the parish when the judgment was rendered, had ceased to be such before the levy. (In note.) *Id.*
 4. **WHERE A. PURCHASED CERTAIN BUILDINGS** at execution sale, which were subject to liens for materials furnished in their erection, and which A. agreed should not be affected by the sale, but that he would pay, and then made an assignment for the benefit of his creditors, with certain preferences, including such liens, the assignees are bound by A.'s agreement, and the liens may be enforced against the property, notwithstanding the sale and assignment. *Twelves v. Williams*, 542.
 5. **EXECUTION DEFENDANT PRESENT AT THE SALE OF HIS PROPERTY** failing to object to it because he has not received the notice to which he is entitled by statute, is not precluded by that fact from raising the objection of want of notice, in a subsequent proceeding. *Carney v. Carney*, 590.
 6. **EXECUTION IS VOIDABLE MERELY, BUT NOT VOID**, when issued upon a satisfied judgment, where such satisfaction has not been entered on the record. *Boren v. McGehee*, 695.
- See CO-TENANCY**, 1, 5; **COVENANTS**, 2; **EXEMPTIONS**; **LEVY**; **REMAINDERS AND REVERSIONS**, 4; **RETURN**; **SHERIFFS' DEEDS**; **SHERIFFS' SALES**.

EXECUTORS AND ADMINISTRATORS.

1. **WHERE AN EXECUTOR**, claiming to be a devisee of certain land, sold it without express authority, and applied the money to the payment of debts of the testator, those who are, upon a proper construction of the will, entitled to the land, may recover it from the purchaser without refunding the money paid. *Walker v. Quigg*, 452.
 2. **EXECUTORS OF A WILL ARE TRUSTEES FOR THE WIFE** of property bequeathed by it to her separate use. *Robinson v. Executors of Dart*, 569.
 3. **OMISSION OF ADMINISTRATOR TO GIVE BOND** on sale of real estate, as required by law, does not make the sale void. *Wyman v. Campbell*, 677.
 4. **AUTHORITY TO ADMINISTRATOR TO SELL HIS INTESTATE'S ESTATE** must be strictly pursued, and the formalities prescribed by the order of sale must be carefully observed. *Id.*
 5. **PURCHASER CAN NOT BE PREJUDICED BY OMISSION OF ADMINISTRATOR** to perform any act after the sale. *Id.*
- See DEVISES**, 14; **EQUITY**, 2, 3; **FRAUDULENT CONVEYANCES**, 6; **PROBATE COURTS**, 1, 2, 3, 4; **TROVER**, 2.

EXEMPTIONS.

1. **STATUTE EXEMPTING FROM ATTACHMENT AND EXECUTION**, beds, bedsteads, bedding, and household utensils of a debtor, necessary for himself, his wife, and children, applies to a man who is not married. *Brown v. Wait*, 154.
2. **BEDS AND BEDDING USED BY A BOARDER** are not exempted. *Id.*
3. **A COOKING-STOVE** not exclusively used for warming the debtor's house is not exempted. *Id.*

4. TO RENDER BEDS AND FURNITURE EXEMPT, housekeeping is not necessary. *Id.*

FALSE PRETENSES.

See CRIMINAL LAW, 2.

FEROCIOUS ANIMALS.

1. WANTON, WILLFUL INJURY done to man or beast while trespassing can not be justified. *Loomis v. Terry*, 306.
2. ONE WHO PERMITS A FIERCE AND DANGEROUS DOG to run at large on his premises is liable, if it there inflicts injuries upon a person in the day-time, though such person is technically guilty of trespass in being on the premises. *Id.*
3. FOR PROTECTION AGAINST TRESPASSERS, one may make defensive erections, or keep defensive animals; but he must not proceed in disregard of human safety, nor further than necessity requires, and should give notice of the presence of the dangerous instrument or animal. *Id.*

FRAUDULENT CONVEYANCES.

1. DELIVERY OF BOARDS UNDER A BILL OF SALE, to secure a prior debt, is not sufficient to pass title against a subsequently attaching creditor, where the boards are lying in different piles about a mill-yard, and the vendor, going in sight of them, points towards them and says, "There is the lumber," and tells the vendee to take it away and make the best of it, and the vendee goes away and leaves the lumber as it is, and exercises no ownership over it for two months, and until the attachment is levied. *Cobb v. Haskell*, 56.
2. CONVEYANCE ABSOLUTE IN TERMS, BUT ATTENDED WITH SECRET TRUST, that the grantor shall have the land again, on repayment of the money he received, is void as against the creditors of the grantor. *Winkley v. Hill*, 215.
3. WHERE GOODS ARE PURCHASED IN A RETAIL STORE, it is necessary, in order to vest the title in the vendee, and make the sale valid as against the creditors of the vendor, that the goods sold should be separated from the bulk of the other goods, and that possession should be delivered with as little delay as is consistent with the nature of the articles purchased. *Eagle v. Eichelberger*, 449.
4. PURCHASE MADE TO DEFRAUD THE VENDOR by selling them for a less price and without paying for them, may be treated as void by him, and he may reclaim the goods; but he must promptly disavow the contract after having notice of the fraud. *Mackinley v. McGregor*, 522.
5. EVIDENCE TO SHOW FRAUDULENT PURCHASE.—The sudden expansion of business, the accumulation of goods beyond the ordinary amount, the immediate sale of some of them at a reduced price, and their repurchase, and the refusal to pay for goods under pretense that they were bought by the debtor's wife, all tend to show a preconceived design to defraud. The transactions and declarations of the wife in making the several purchases are also admissible. *Id.*
6. DONEE UNDER DEED FRAUDULENT AS TO CREDITORS is liable to them as executor *de son tort* for personal property, the possession of which he has taken, and which he has consumed subsequently to the death of his donor. *Tucker v. Williams*, 561.

7. **FRAUDULENT GRANTOR WILL NOT BE AIDED** in recovering the unpaid part of the purchase price of the property conveyed. *James v. Bird's Adm'r*, 668.

See **ASSIGNMENTS**, 3; **RESCISSION**, 1; **TROVER**, 1, 2; **VOLUNTARY CONVEYANCES**.

FRAUDULENT REPRESENTATIONS.

MISREPRESENTATION OF ADVANTAGES OF A PURCHASE, made to a buyer, by the seller, the latter being under no legal obligation to speak the truth in regard to the matter, can not form the basis of a suit either at law or in equity. *Dugan v. Cureton*, 727.

GAMING.

1. **HORSE-RACING IS A GAME**, within the meaning of the statute of Missouri, to restrain gaming. *Shropshire v. Glascock*, 189.
2. **BOND GIVEN FOR MONEY WON AT HORSE-RACING**, or to secure a forfeiture for failure to run a horse-race, is void. *Id.*

GIFTS.

1. **GIFT OF THE PRODUCE OR INTEREST** of a fund without limitation as to the extent of its duration is, *prima facie*, a gift of that produce or interest in perpetuity, and is consequently a gift of the fund itself. *Garret v. Rex*, 447.
2. **PAROL GIFT OF LAND TO A CHILD**, accompanied by permanent improvements, gives an indefeasible title to have the contract executed. *Young v. Glendening*, 492.
3. **COMPENSATION FOR IMPROVEMENTS** by perception of profits is not a bar to the specific performance of a gift. *Id.*
4. **GIFTS TO A FEME-SOLE OR HER TRUSTEES** to her separate use, free from the control of any future husband, and not subject to his debts or disposition, are, as to such restraints, void, unless they are settlements made in immediate contemplation of marriage. *Smith v. Starr*, 498.
5. **DEED CAN NOT OPERATE AS A DONATIO CAUSA MORTIS** unless there has been a delivery of the deed during the life of the grantor. *Gilmore v. Whitesides*, 563.
6. **GIFT OR BEQUEST OF PERSONAL PROPERTY FOR LIFE**, with unlimited power of disposition superadded, creates an absolute interest. *Davis v. Richardson*, 581.

GRANTS.

GRANT OF LAND BY AN ACT OF THE LEGISLATURE vests an actual seisin in the grantee. *Proprietors of Enfield v. Permit*, 207.

GUARANTY.

RELEASE OF GUARANTOR.—If an order be drawn on a storekeeper, agreeing to be accountable to the amount of seventy dollars, for goods to be furnished to a third person, and requesting the amount of the bill to be sent him, and the storekeeper sells such third person goods to the amount of one hundred and two dollars and eighty-one cents, for which he takes a note due in thirty days, the drawer of the order is released; because his position is that of guarantor, and the taking of the note is an extension of time to the principal. *Hunt v. Smith*, 296.

GUARDIAN AND WARD.

1. ACTION FOR MONEY HAD AND RECEIVED may be maintained by former guardian against his ward, where the former sold the land of the latter, but the sale was subsequently set aside as void, in an action by the ward, although the guardian had accounted for the proceeds of such sale and had his account settled by a decree of the probate court. *Burleigh v. Bennett*, 213.
2. GUARDIAN OF INFANT CAN NOT CONVEY real estate of his ward without the special authority of a court of equity. *Antonidas v. Walling*, 248.
3. SUCH CONVEYANCE WILL BE SET ASIDE, although the infant has received the consideration thereof; but in setting it aside, where there is no fraud, the court will restore the parties to their former property and rights as nearly as it can be done. *Id.*
4. INFANT WILL, IN SUCH CASE, BE DECREED TO REFUND the consideration money, and to allow for such improvements as were made by a prudent and judicious management of the estate, as by repairing fences and buildings and manuring the land, but not to allow for permanent improvements, such as building houses. *Id.*

HORSE-RACING.

See GAMING.

HIGHWAYS.

See CORPORATIONS, 1; DEDICATION, 1, 2, 3, 4, 5; EASEMENTS AND SERVITUDES; MUNICIPAL CORPORATIONS, 1, 2, 3; NUISANCE, 1, 2, 5.

HOMICIDE.

See CRIMINAL LAW, 1.

HUSBAND AND WIFE.

1. UNDER A CONVEYANCE TO HUSBAND AND WIFE, they are not seized of moieties, but of the entirety, and the survivor takes the whole. *Harding v. Springer*, 61.
2. WIFE HAVING EQUITABLE RIGHTS AGAINST HER HUSBAND is entitled to protection from judgment liens against him. *Van Duzer v. Van Duzer*, 257.
3. HUSBAND BY MARRIAGE ACQUIRES an immediate and vested interest in wife's realty for their joint lives. *Id.*
4. WIFE CAN NOT IN EQUITY ENJOIN SALE of husband's life interest in her realty, unless he has forfeited his right thereto by such a breach of the marital contract as entitles her to a decree of separation. *Id.*
5. JOINDER BY A MARRIED WOMAN IN THE DEED of her husband's attorney in fact, will bar her of dower, under a statute which prescribes that a right of dower may be barred, either by a joinder of the married woman in her husband's conveyance, or else by her joining in the husband's power of attorney to convey. *Glenn v. Bank of the United States*, 429.
6. HUSBAND AND WIFE, BY THE CIVIL LAW, are for most purposes treated as separate distinct persons, entitled to sue and to contract with one another. *Mackinley v. McGregor*, 522.
7. HUSBAND AND WIFE, BY THE COMMON LAW, are treated as one for most purposes, and the husband as being that one. *Id.*

8. MARRIED WOMAN MAY, AS AGENT OF HER HUSBAND, make him responsible on contracts, if the circumstances are such as to show his assent, express or implied. *Id.*
9. HUSBAND, BY NOT RETURNING GOODS ORDERED BY WIFE, may adopt her purchase of them, even when living separate from her. *Id.*
10. HUSBAND MUST DISSENT FROM WIFE'S CONTRACT, if known to him, in order to avoid responsibility for it. *Id.*
11. CREDIT BEING GIVEN TO THE WIFE ALONE, the husband is not liable. *Id.*
12. HUSBAND IS LIABLE FOR TORTS OF WIFE, and an action may be sustained against him to recover goods of which she holds possession. *Id.*
13. WIFE HAS NO POWER TO DISPOSE OF or charge the estate settled to her separate use, even with consent of husband or trustee. *Robinson v. Executors of Dart*, 569.
14. HUSBAND WILL NOT BE APPOINTED WIFE'S TRUSTEE, though the wife join in his petition that he be so appointed, and though he offer security for the return by him of the fund settled to her separate use, of which he seeks control. *Id.*
15. WHERE ARTICLES ARE BEQUEATHED TO THE SEPARATE USE OF A WIFE, the use of which can be enjoyed only by having possession, such as articles of wearing apparel and furniture, she is entitled to their immediate possession. *Id.*
16. A WIFE IS ENTITLED TO THE INCOME ONLY of stocks and moneys bequeathed to her separate use, though the will provides that her receipt for the property shall constitute a sufficient discharge to the executor. *Id.*

See AGENCY, 7.

IDIOTS.

See DOMICILE, 2.

ILLEGAL CONTRACTS.

See CONSIDERATION, 1, 4, 5; GAMING, 2; SUNDAY.

IMPROVEMENTS.

See GIFTS, 2, 3; VENDOR AND VENDEE, 3.

INDEMNITY.

See CONSIDERATION, 2, 3.

INFANCY.

1. INFANT'S DEED OF BARGAIN AND SALE IS VOIDABLE, but not void. *Bool v. Mix*, 285.
2. INFANT'S DEED OF BARGAIN AND SALE MAY BE AVOIDED by his executing another deed to a third person after coming of age, or by an actual entry on the land for the purpose of disaffirming the deed, or by performing some other act clearly demonstrating his intent to avoid his deed. *Id.*
3. ACTION TO RECOVER LANDS CONVEYED BY AN INFANT can not be maintained by him until he has first done some act which is sufficient to disaffirm and avoid his deed. *Id.*

See GUARDIAN AND WARD; PARENT AND CHILD.

INJUNCTIONS.

See NUISANCE, 6, 7, 8.

INNKEEPERS.

1. **INNKEEPER IS BOUND TO ADMIT, UNDER PROPER LIMITATIONS, TRAVELERS** and those also who have business with them as such, and if he gives a general license to enter his inn to some persons whose business is connected with his guests, in their character as travelers, he can not lawfully exclude others, pursuing the same business, and who enter for a similar object. *Markham v. Brown*, 209.
2. **STAGE-DRIVER MAY ENTER AN INN** and go into the public rooms where travelers are usually placed, to solicit passengers for his coach, if he has a reasonable expectation that passengers are there, comes at a suitable time and in a proper manner, conducts himself peaceably, remains no longer than is necessary, and does no injury to the innkeeper; and this he may do notwithstanding the prohibition of the innkeeper, if the latter allows like privileges to the drivers of other coaches. *Id.*
3. **SUCH DRIVER MAY, HOWEVER, FORFEIT THESE RIGHTS** by his misconduct, as by causing affrays or quarrels, making a noise, disturbing guests in the house, interfering with its due regulation, intruding into private rooms, remaining longer than is necessary after being requested to depart, or by improper importunity to the guests to induce them to take passage with him; and if he is guilty of any of these acts of misconduct or impropriety, the innkeeper may prohibit him from entering his inn, and treat him as a trespasser if he disregards such prohibition. *Id.*
4. **ONE WHO ENTERS AN INN LAWFULLY** may be treated as a trespasser *ab initio*, if, after entry, he commits an assault upon the owner or a trespass upon his property. *Id.*
5. **INNKEEPER CAN NOT EXPEL FROM HIS INN DRIVER OF RIVAL LINE OF COACHES** for the misconduct of drivers of other lines towards him, unless it is at the time of a disturbance and for the purpose of restoring quiet to the house. *Id.*

INSURANCE—MARINE.

1. **OPEN POLICY IS VALID THOUGH IT INSURE AN AMOUNT GREATER IN VALUE** than the property; but in such case the recovery is restricted, where a loss has occurred to the value of the property. *Cohen v. Charleston Fire and Marine Ins. Co.*, 549.
2. **NOTICE OF THE CONDITION OF A VESSEL NEED NOT BE GIVEN**, prior to its abandonment, where it has arrived in a foreign port in a state that would justify an abandonment. *Id.*
3. **PORT OF A SISTER STATE** is a foreign port. *Id.*
4. **NOTICE OF ABANDONMENT** as for a total loss must be given to the insurer within reasonable time. *Id.*
5. **WHERE THE COST OF REPAIRS WOULD EXCEED ONE HALF THE VALUE** of the vessel as repaired, the insured may abandon for a total loss. *Id.*

See COMMON CARRIERS, 7, 8, 9, 10, 11.

INTEREST.

CONFLICT OF LAWS, 5, 6.

INTOXICATION.

CONTRACT OBTAINED FROM A PERSON INTOXICATED to such degree that he can not consent understandingly, will in equity be decreed to be canceled. *Heirs of French v. French et al.*, 441.

JOINT TENANCY.

See CO-TENANCY, 3.

JUDGMENTS.

1. **JUDGMENT RENDERED "FOR THE PLAINTIFF,"** BY A JUSTICE OF THE PEACE, is necessarily implied and understood to be against the defendant named in all the other proceedings in the case. *Titus v. Whitney*, 228.
2. **JUDGMENT OF JUSTICE OF PEACE WILL NOT BE REVERSED** merely because the copy of the summons served upon the defendant named ten A. M., instead of ten P. M., as the hour for his appearance, where he did not appear at any hour on that day, and there is no ground to infer that he suffered injury by reason of the mistake. *Id.*
3. **JUDGMENT AGAINST OWNER OF EQUITY OF REDEMPTION** docketed after decree but before sale, has a lien on the surplus proceeds; but he has not such lien if the docketing is subsequent to the sale. *Sweet v. Jacocks*, 252.
4. **JUDGMENT OF A JUSTICE OF THE PEACE** can not be impeached in a collateral action by showing by parol evidence that the defendant was not served with process, and that the court never acquired jurisdiction of his person. *Tarbox v. Hays*, 478.
5. **JUDGMENT OF A JUSTICE OF THE PEACE** can not be impeached in an action of replevin to recover goods sold by authority of an execution issued on the judgment, although the plaintiff in execution was the purchaser of the goods and the defendant in the action of replevin. *Id.*
6. **LIEN OF A JUDGMENT UPON LANDS** relates to the first day of the term at which it was rendered, and overreaches intermediate deeds of trust or other incumbrances. *Skipworth v. Cunningham*, 642.
7. **COMMENCEMENT OF TERM** to which lien of judgment has relation is the first day of the term upon which the court sits. *Id.*
8. **PAYMENT OF JUDGMENT BY SHERIFF, WITHOUT KNOWLEDGE OF DEFENDANT** in execution, is a discharge thereof, and has the same effect as if made by the defendant. *Boren v. McGehee*, 695.
9. **ASSIGNMENT OF JUDGMENT MADE ON SHERIFF'S DOCKET**, the same being a private memorandum book which the law does not require him to keep, is not notice to any one except the parties to the transaction. *Id.*
10. **MERE POSSESSION OF TRANSCRIPT OF JUDGMENT RAISES NO PRESUMPTION** that the possessor has any interest therein sufficient to enable him to bring a suit thereon. *Tally v. Reynolds*, 737.
11. **RECITAL IN THE RECORD OF A JUSTICE OF THE PEACE**, that "the parties were duly notified," is sufficient to sustain a judgment by default, without stating the facts necessary to constitute a legal notice. *Fox v. Hoyt*, 760.
12. **A JUDGMENT OF A JUSTICE OF THE PEACE** in an action of book debt

upon the defendant's default, "that the plaintiff recover of the defendant the sum of five dollars damages, and his costs of suit," is sufficient. *Id.*

See ATTORNEY AND CLIENT, 1, 5, 6; BONDS, 2; LIENS, 3; MARRIED WOMEN, 5, 7, 8.

JURISDICTION.

1. EVERY ACT OF A COURT OF COMPETENT JURISDICTION is presumed to have been rightly done until the contrary appears; and this rule applies as well to every judgment or decree rendered in the various stages of the proceedings, from their initiation to their completion, as to an adjudication that the plaintiff has a right of action. *Fox v. Hoyt*, 760.
2. JUSTICE OF THE PEACE HAVING JURISDICTION of a cause before him, and this appearing from the face of the process and proceedings, has jurisdiction over all interlocutory acts necessary to a final judgment. *Id.*
3. COURTS OF RECORD ARE THOSE PROCEEDING according to the common law, whose judgments may be revised by writs of error, and whose proceedings and judgments import absolute verity, and until reversed, protect all who obey them. *Id.*
4. COURTS OF JUSTICES OF THE PEACE in Connecticut are, in this respect, courts of record, the same as the county and superior courts. *Id.*

See EQUITY, 2, 5; PROBATE COURTS.

JURY.

1. SEPARATION OF THE JURY ON TRIAL OF A CRIMINAL CASE, caused by the absenting themselves of some of the jurors from the remainder of the jury, after it had retired from court for the night, for the space of fifteen or twenty minutes, without their being in charge of an officer, will vitiate the verdict of conviction in the case, and entitle the prisoner to a new trial, without its being required of him to show, in addition to these facts, that the jurors were, after their separation, tampered with. *McLain v. State*, 573.
2. DISCHARGE OF THE JURY IN A CRIMINAL CASE, without legal justification for the act, entitles the prisoner to a discharge, as if acquitted. *Mahala v. State*, 591.
3. RIGHT TO DISCHARGE JURY IN A CRIMINAL CASE without the consent of the prisoner, exists only in cases of necessity, which may be classed under the following heads: 1. Where the court is compelled by law to adjourn before the jury can agree upon a verdict; 2. Where the prisoner's misconduct places it without the power of the jury to examine his case correctly; 3. Where no possibility exists that the jury will agree upon a verdict. *Id.*
4. IMPOSSIBILITY OF AGREEMENT UPON A VERDICT, to justify the discharge of the jury, must be an impossibility founded upon some physical cause, such as sickness or insanity of a juror, or exhaustion of the jury; but that they can not bring their minds to an agreement will not justify their discharge. Thus, the discharge at half-past nine Friday morning of a jury to whom the case had been submitted at two o'clock P. M. the previous day, because they are unable to agree upon a verdict, will entitle the prisoner to his discharge. *Id.*

JUSTICES OF PEACE.

See JUDGMENTS, 1, 2, 4, 5, 11, 12; JURISDICTION, 2, 4.

JUSTIFICATION BY PROCESS.

See ARREST; ATTACHMENTS, 2.

LANDLORD AND TENANT.

1. PAYMENT OF RENT IN ADVANCE is good, as against vendee of the leased premises, without notice of the payment. *Stone v. Patterson*, 156.
2. ENTRY BY MORTGAGEE OF LEASED PREMISES and demand of payment of rent to him, though it may not be good for the purpose of foreclosure, is lawful, and will entitle him to the rent. *Id.*
3. DEMAND FOR THE EXECUTION OF A LEASE NEED NOT BE PROVED, if it be shown that the landlord refused to give possession, and did not intend to comply with his contract to execute the lease. *Driggs v. Dwight*, 283.
4. RENT CHARGE CAN BE CREATED only by granting an annual sum out of land charged with a clause of distress. *Cuthbert v. Kuhn et al.*, 513.
5. APPORTIONMENT OF RENT WILL BE MADE at the instance of a tenant when a public street is opened through the demised premises; the amount of deduction to which he is entitled must be fixed by a jury. *Id.*

See DAMAGES, 2, 3.

LEASES. .

See DAMAGES, 2, 3; LANDLORD AND TENANT.

LEGACIES AND LEGATEES.

1. LEGATEE CLAIMING UNDER WILL THAT DEVISES AWAY PROPERTY OF WHICH HE IS OWNER can have the benefit of his legacy, only upon renouncing in favor of the devisee his right to the property devised. *Kinnaird v. Williams*, 658.
2. DEVISEE WHOSE CLAIM IS DEFEATED BY THE ASSERTION BY A LEGATEE of title paramount to the will, is entitled to the legacy of such legatee. *Id.*

LEGISLATIVE GRANTS.

See GRANTS.

LEVY.

1. LEVY TO BE VALID must generally be accompanied with an actual seizure, but the defendant may dispense with it for his own accommodation, and as between him and the officer, it is valid. *Trovillo v. Tilford*, 484.
2. WHEN GOODS ARE LEVIED UPON, and by agreement left in the possession of the defendant, the latter becomes the agent of the officer, and upon his refusing to redeliver them according to his agreement, trespass *vi et armis* may be maintained against him and any one who aids him in retaining or removing them. *Id.*

See Co-TENANCY, 5.

LEX LOCI CONTRACTUS.

See CONFLICT OF LAWS, 1, 6, 7.

LEX LOCI REI SITÆ.

See CONFLICT OF LAWS, 2, 3, 5, 8.

LIBEL.

1. LIBEL IS AN OFFENSE PUNISHABLE in New Hampshire by indictment. *State v. Burnham*, 217.
2. PUBLICATION OF MATTER IN ITS NATURE DEFAMATORY, unless made upon a lawful occasion, or unless it comes within the class termed privileged cases, renders the person responsible for such publication liable to prosecution; and it is immaterial, in such case, whether the allegations are true or false. *Id.*
3. PARTY MAY JUSTIFY OR EXCUSE PUBLICATION OF LIBELOUS MATTER when the occasion is lawful, as where his object was to secure the removal of an incompetent officer, to prevent the election of an unsuitable person to office, or to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information. *Id.*
4. MERE COLOR OF LAWFUL OCCASION and pretense of justifiable end, can not shield from liability a party who publishes and circulates defamatory matter. *Id.*
5. DEFENDANT MAY JUSTIFY PUBLICATION BY PROVING THE TRUTH of the matter alleged, if the occasion was a proper one for circulating the matter set forth; but in such case the justification must be as broad as the charge, and it is not sufficient to show that part of the matter is true. *Id.*
6. MOTIVES OF DEFENDANT ARE NOT IN QUESTION where he justifies by showing that there was a lawful occasion for the publication, and that the matter published is true. *Id.*
7. DEFENDANT MAY, IF HE CAN NOT JUSTIFY, EXCUSE PUBLICATION by showing that it was made on a lawful occasion, upon probable cause, and from good motives; but probable cause alone will not, upon any occasion, excuse the publication of falsehood, from actual malice. *Id.*
8. WORDS WRITTEN AND PUBLISHED are actionable *per se*, where they are calculated to reflect shame and disgrace on the person of whom they are written, or to hold him up as an object of hatred or contempt, though they impute no crime. *Fonville v. McNease*, 556.
9. WRITTEN WORDS ARE NOT PUBLISHED, in the sense that will support a civil action, where the instrument containing them reaches the person only of whom they are written, though the latter afterwards makes its contents public. *Id.*
10. VERBAL ADMISSIONS OF A PARTY OF HIS AUTHORSHIP OF AN INSTRUMENT that has reached the person of whom it is written, upon being questioned as to the matter by the latter, in public, constitutes no publication. *Id.*
11. WRITTEN SLANDER, TO BE ACTIONABLE, must impute something which tends to disgrace a man, lower him in, or exclude him from society, or bring him into contempt or ridicule; and the court must be able to say from the publication itself, or such explanation as it may admit of, that it does contain such an imputation, and has legally such a tendency. *Rice v. Simmons*, 766.
12. MERE GENERAL ABUSE AND SCURRILITY, however ill-natured and vexatious, is not actionable, whether written or spoken, if it does not convey a degrading charge or imputation. *Id.*

13. A PUBLICATION, TO BE LIBELOUS, NEED NOT CONTAIN a direct and open charge, but if, taking the terms in their ordinary acceptation, it conveys a degrading imputation, however indirectly, it is a libel. *Id.*
14. WHERE AN ALLEGED LIBEL CONTAINS ANYTHING THAT IS OBSCURE, or needs explanation to give it the force of slander, the pleader should point it by innuendo or prefatory averment. *Id.*
15. WORDS WHICH, WHEN USED, DO NOT OF THEMSELVES, or by the connection in which they are used, convey an evil import, should be connected by averments with such a state of facts as would show that they contain a slanderous imputation. *Id.*

LIENS.

1. LIEN IS WAIVED BY AGREEMENT TO GIVE CREDIT, or to receive payment in a particular mode inconsistent with the existence of a lien. *Stoddard Woolen Manufactory Co. v. Huntley*, 198.
 2. NO LIEN EXISTS UPON GOODS REMAINING in hands of a party when the time of payment arrives, in a case where a credit has once been given. *Id.*
 3. JUDGMENT LIENS DO NOT PREVAIL over prior equitable claims on the same property. *Sweet v. Jacocks*, 252.
 4. VENDOR OF PERSONAL PROPERTY has no equitable lien thereon to secure the payment of the purchase money, even while the property remains in the vendee's hands. *James v. Bird's Adm'r*, 668.
- See AGENCY, 4, 6; ATTORNEY AND CLIENT, 5, 6; BONDS, 2; EXECUTIONS, 4; JUDGMENTS, 3, 6.

MALICIOUS PROSECUTION.

See PROBABLE CAUSE.

MANSLAUGHTER.

See CRIMINAL LAW, 1.

MARINE INSURANCE.

See COMMON CARRIERS, 7, 8, 9, 10, 11; INSURANCE.

MARRIED WOMEN.

1. A MARRIED WOMAN MAY CONVEY HER REAL PROPERTY in New York by deed, though she could not do so at common law. *Bool v. Mix*, 285.
2. THE DEED OF AN INFANT FEME-COVERT has no greater effect than if she were unmarried. *Id.*
3. COVENANTS OF WARRANTY OF A FEME-COVERT in a deed of her real estate will operate as an estoppel to her asserting any subsequently acquired title to the land. *Lessee of Hill v. West*, 442.
4. WHEN COVERTURE CEASES, THE CLAUSE AGAINST ANTICIPATION, in a settlement in trust for a married woman, is no longer binding. *Smith v. Starr*, 498.
5. BOND AND WARRANT OF ATTORNEY OF MARRIED WOMAN, though her husband join with her, is void; so also are the judgment entered on such bond and a sale of her estate made thereunder. *Dorrance v. Scott and Wife*, 509.
6. COVERTURE MAY BE GIVEN IN EVIDENCE under plea of *non est factum*. *Id.*

7. JUDGMENT ON SCIRE FACIAS against a married woman, founded on a void judgment, is also void. *Id.*
 8. A MARRIED WOMAN'S POWER TO BARGAIN AND SELL her separate estate by deed executed in the presence of two or more witnesses, does not have the effect to make valid a bond and warrant of attorney executed by her, and which does not purport to convey or affect her realty, and a judgment under such bond is no lien on her realty. *Id.*
 9. MARRIED WOMAN CAN NOT CONTRACT so as to render herself personally liable. *Mackinley v. McGregor*, 522.
 10. CERTIFICATE OF A JUDGE OR JUSTICE, of the acknowledgment of a deed by a married woman, is to be judged solely by what appears on the face of the certificate. *Jamison v. Jamison*, 536.
 11. PAROL EVIDENCE OF WHAT PASSES at the time an acknowledgment is taken and certified, is inadmissible, except in cases of fraud or imposition. *Id.*
 12. ALTHOUGH A MARRIED WOMAN is not named as a grantor in a mortgage, yet if it sufficiently appear from the instrument itself, coupled with the fact that she joined in its execution, that she intended to convey her interest, it will be sufficient for that purpose. *Id.*
 13. MORTGAGE OF THE WIFE'S REAL ESTATE, executed by husband and wife, to secure the debt of the former, and acknowledged by her in the manner required by law in respect to absolute conveyances, is sufficient to bind her estate. *Id.*
 14. CERTIFICATE OF ACKNOWLEDGMENT OF A DEED by a married woman, which states that, "she being of full age, separate and apart from her husband by me examined, declared that she did voluntarily, of her own free will and accord, seal and acknowledge the within indenture without coercion of her said husband, the contents being by me first made known to her," is sufficient. *Id.*
- See DEVISES, 4, 6, 10; DOWER; EXECUTORS AND ADMINISTRATORS, 2; GIFTS, 4; HUSBAND AND WIFE; VOLUNTARY CONVEYANCES.

MASTER AND SERVANT.

See ATTACHMENTS, 1.

MASTER OF VESSEL.

See AGENCY, 3, 4, 5.

MEASURE OF DAMAGES.

See CONSPIRACY, 3; DAMAGES.

MISREPRESENTATION.

See FRAUDULENT REPRESENTATIONS.

MISTAKE.

1. MERE MISTAKE OF LAW is not, in the absence of fraud, surprise, or undue influence, a sufficient ground for relief in equity. *Per Bronson, J. Champlin et al. v. Laytin*, 382.
2. THE PRESUMPTION IS, THAT EVERY MAN UNDERSTANDS HIS LEGAL RIGHTS, provided he has full knowledge of the facts. *Id.*

3. **MONEY PAID UNDER FULL KNOWLEDGE OF THE FACTS** can not be recovered on the ground that the payor was ignorant of the law. *Per Bronson, J. Id.*
4. **MISTAKE OF FACT OCCASIONED BY ACTING ON THE REPRESENTATIONS OF ANOTHER**, which representations were in turn occasioned by a mistake of law, is sufficient ground for relief in equity from a contract entered into with the person making the representations, and on the faith thereof. *Id.*
5. **MISTAKE OF LAW ON THE PART OF BOTH CONTRACTING PARTIES**, owing to which the object of their contract can not be attained, is sufficient ground for setting aside such contract. *Per Paige, Senator. Id.*
6. **DISTINCTION BETWEEN MISTAKE OF LAW AND IGNORANCE THEREOF**, maintained. *Per Paige, Senator. Id.*
7. **MISTAKE OF A PERSON** will not in equity be permitted to benefit him, at the expense of those who were injured by the mistake. Thus where an intended wife requested her future husband to procure for her a deed, whereby she might settle certain property upon a sister, and he thereupon procured for her a defective deed, the deed will in equity, after the marriage and subsequent death of the wife, be set up against the husband who by the marriage obtained the property which the deed purported to settle. *Brown v. Bonner, 637.*

MONEY. HAD AND RECEIVED.

See GUARDIAN AND WARD, 1.

MORTGAGES.

1. **MORTGAGOR WITH WARRANTY IS NOT ESTOPPED** from subsequently claiming the land as heir of the mortgagee who had a good title at the time of the mortgage; nor is one estopped who claims under a levy of an execution against the mortgagor. *Harding v. Springer, 61.*
2. **RIGHTS OF CONFLICTING CLAIMANTS** to a fund in court, being the surplus resulting from sale of mortgaged property, may be settled by a reference to the master, or by directing a bill to be filed; and one who resorts to a reference to the master can not be heard to complain because other claimants have taken the same course. *Sweet v. Jacocks, 252.*
3. **DEED OF RELEASE OF A MORTGAGEE TO HIS MORTGAGOR** vests no new title in the latter, who will continue to hold by his original title, and therefore subject to the lien of any mortgages executed by him subsequent to the date of his mortgage to the mortgagee from whom he has obtained the release. *Lessee of Hill v. West, 442.*
4. **MORTGAGEE PURCHASING AT HIS OWN SALE** need not be required to pay the money which he is entitled to have repaid him as such mortgagee; and if, after such sale, no money is paid the sheriff, the latter agreeing to accept the mortgagee's receipt in lieu of money, and the costs remain unpaid, and the sheriff, though he has executed a deed, has never acknowledged it, nor has he received the mortgagee's receipt, the purchaser has nevertheless acquired title so that a subsequent sale under a junior lien is inoperative. *Stoeber v. Rice, 495.*
5. **EQUITY OF REDEMPTION CAN NOT BE FORECLOSED** by any form of words used in an instrument, when the real intention of the parties was to se-

cure the payment of a debt, and not to extinguish it. *Baxter v. Willey*, 623.

6. **ABSOLUTE CONVEYANCE OF LAND IN PAYMENT OF OVERDUE NOTES** which are not delivered up to the grantor, would probably be treated as a mortgage, if the land were situated in Vermont, but otherwise when it is situated in Canada, where such a transaction would be treated as an absolute conveyance in payment of the debt, as it would be in Vermont also, had the notes been surrendered. *Id.*

See **CONDITIONAL SALES**, 2; **CONFLICT OF LAWS**, 5; **LANDLORD AND TENANT**, 2; **MARRIED WOMEN**, 12, 13.

MUNICIPAL CORPORATIONS.

1. **A HIGHWAY WITHIN A CITY** may be established by use of it, as such, for more than forty years. *Thayer v. Boston*, 157.
2. **AN INDIVIDUAL SUFFERING SPECIAL DAMAGE** from the obstruction of a highway may have his action therefor, although the act is indictable. *Id.*
3. **THE SPECIAL DAMAGE, TO SUPPORT SUCH ACTION**, must be something not merely differing in degree, but in kind, from that which must be deemed common to all. *Id.*
4. **ACTION OF TORT WILL LIE** against a corporation. *Id.*
5. **A MUNICIPAL CORPORATION IS LIABLE** on an action on the case for authorized acts of its officers, for which such an action would lie against individuals, or for acts which it has ratified. *Id.*
6. **IDEM.—BUT FOR UNAUTHORIZED AND UNLAWFUL ACTS** of its officers, though done *colore officii*, the corporation is not liable. *Id.*

See **EASEMENTS AND SERVITUDES**; **NUISANCE**, 1.

NEGLIGENCE.

See **FEROCIOUS ANIMALS**.

NEGOTIABLE INSTRUMENTS.

1. **ACCOMMODATION INDORSER** who indorses for the purpose of enabling the maker of the paper to sustain his credit, and to enable him to aid himself in his business, is liable to a holder who receives the paper as security for a pre-existing liability. *Kimbrow v. Lytle*, 585.
2. **NOTE IS RECEIVED IN DUE COURSE OF TRADE** where the holder has given for it money, goods, or credit, or has sustained on its account some loss or incurred some liability. *Id.*

See **AGENCY**, 1, 2, 3, 4, 5; **CONSIDERATION**, 1; **PARTNERSHIP**.

NEW TRIAL.

1. **EXCEPTIONS TO ERRONEOUS INSTRUCTIONS** upon an immaterial point will not be sustained as a ground for a new trial. *Jewett v. Lincoln*, 36.
2. **ADMISSION OF IMMATERIAL TESTIMONY** is no ground for a new trial. *Watson v. Proprietors of Lisbon Bridge*, 49.
3. **ADMISSION OF IRRELEVANT TESTIMONY** will not justify the granting of a new trial, if the fact sought to be proved by it was not controverted. *Crosby v. Fitch*, 745.

NOTARIES.

1. **A NOTARY PUBLIC** is an officer known to the common law. *Kirksey v. Bates*, 722.

2. **SEALS.**—NOTARIES PUBLIC WERE AUTHORIZED at common law to provide their own seals. *Id.*
3. **NOTARY PUBLIC MAY PROVIDE HIS OWN SEAL**, notwithstanding a statute which enacts that notarial seals shall bear the arms of the state, where the legislature has failed to provide what shall be the arms of the state. *Id.*

NOTICE.

CONSTRUCTIVE NOTICE OF CONTENTS OF A DEED BECAUSE KNOWN TO ONE'S AGENT is not implied in favor of a vendor and against a vendee, so as to preclude the latter from relief from his contract with the former. *Champlin et al. v. Laytin*, 382.

See BONA FIDE PURCHASERS, 2, 3; **CONDITIONAL SALES**; **EXECUTIONS**, 5; **PROBATE COURTS**, 4.

NUISANCE.

1. **A CITY MAY LAY OUT HIGHWAYS**: public highways may be proved by prescription or by dedication within its limits, and for a nuisance thereon an indictment will lie. *Stetson v. Faxon*, 123.
2. **A BUILDING OR A FENCE ON A PUBLIC HIGHWAY**, when not in existence for sixty years, may be treated as a nuisance. *Id.*
3. **FOR A NUISANCE COMMON TO THE PUBLIC**, indictment must be resorted to; where an individual receives special injury, an action for damages will also lie. *Id.*
4. **IN AN ACTION FOR A NUISANCE**, allegations of special damage are essential; plaintiff must show that he has sustained particular injury different in character from that common to all the citizens. *Id.*
5. **ERECTING A BUILDING OUT INTO THE STREET**, whereby plaintiff's warehouse is obstructed from view, free communication therewith cut off, causing tenants to desert it, and necessitating reducing rents, is a sufficient statement of a nuisance occasioning particular injury, for which an action will lie. *Id.*
6. **BILL TO ENJOIN A PUBLIC NUISANCE** lies at the instance of a private individual who is injuriously affected thereby. *Rosser v. Randolph*, 712.
7. **INJUNCTION AGAINST A NUISANCE** will be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or invasion of a legal right. Thus, where the erection of a mill will cause the overflow of a spring from which plaintiff obtains his drinking water, an injunction will not be granted where it does not appear but that water might be obtained elsewhere, and where it does appear that by a slight expenditure of time and labor the spring could be protected from overflow. *Id.*
8. **CHANCERY WILL RARELY ENJOIN A NUISANCE** prior to a trial at law wherein the nuisance is established. *Id.*

OFFICE AND OFFICERS.

1. **PROCESS OF A COURT OF COMPETENT JURISDICTION** is SUFFICIENT PROTECTION for the acts of its officers done in pursuance thereof, however irregular and erroneous may have been the proceeding in which it issued. *Yeager v. Carpenter et al.*, 665.
2. **OFFICERS OF THE MILITIA CALLED INTO ACTIVE SERVICE**, upon requisition of the general government, have not authority to bind the United States

by their purchase of supplies that they deem necessary, or even indispensable, for their troops. *Gillaspie v. Wesson*, 715.

3. WHERE A STATUTE CREATES AN OFFICE PREVIOUSLY KNOWN TO THE COMMON LAW, reference must be had to that law for the purpose of ascertaining the officer's duties and the manner in which they are to be performed, in the absence of legislation establishing another rule. *Kirtsey v. Bates*, 722.

See CORPORATIONS, 20, 21.

PARENT AND CHILD.

1. THE FATHER IS ENTITLED TO HIS MINOR SON'S EARNINGS; but may voluntarily relinquish this right, and the son will be entitled to recover the value of his services from his employer, who may not have known of the relinquishment. *Corey v. Corey*, 117.
2. IN SUCH CASE, IN ABSENCE OF AN EXPRESS PROMISE by the employer to pay the son, the law will imply one. *Id.*

See DOMICILE.

PARTITION.

1. PARTITION MADE BY TENANTS OF ESTATES FOR LIFE is not binding on those entitled to estates in remainder. *Bool v. Mix*, 285.
2. PARTITION CAN NOT BE HAD OF LANDS PURCHASED WITH PARTNERSHIP FUNDS, and held as partnership assets, prior to a settlement of the partnership accounts. *Baird v. Baird's Heirs*, 399.

See PROBATE COURTS, 4; REMAINDERS AND REVERSIONS, 1.

PARTNERSHIP.

1. PARTNERS, WHO LIABLE AS.—Where three persons run a line of stages between two given points, and divide the line into three parts, each person owning and maintaining all the stock, and having absolute control of his part, but all agree that the moneys received on any part of the whole line shall be put into a common fund, and after deducting the expense of tolls, shall be divided between the three in proportion to the number of miles of the line operated by each, they are, as between themselves and third persons, partners, and are jointly liable for an injury to a passenger happening on any part of the line. *Champion et al. v. Bostwick and Wife*, 376.
2. PROPERTY JOINTLY OWNED by the partners is not required to constitute a partnership. *Id.*
3. RIGHT TO JOINTLY SHARE PROFITS makes the parties liable as copartners; but there may be cases in which a person receives a compensation for his labor in proportion to the gross profits of a business, without his becoming a copartner. *Id.*
4. PARTNERS ARE LIABLE FOR A TORT committed by one of their number, or by his servant or agent, in the prosecution of the partnership business. *Id.*
5. PARTNER CAN NOT HAVE PARTIAL ACCOUNT; but accounts between partners must embrace all partnership transactions. *Baird v. Baird's Heirs*, 399.
6. MONEY BORROWED BY A PARTNER UPON HIS INDIVIDUAL CREDIT, and for which he gives his separate bond, is not chargeable to the partnership, though it comes to its use. *Willis v. Hill*, 412.

7. DECLARATIONS OF A PARTNER AFTER DISSOLUTION can not charge the partnership with a debt; though if the existence of the debt and the original liability be proved otherwise, such declarations would be sufficient to remove the bar of the statute of limitations. *Id.*
8. NOTE GIVEN BY ONE PARTNER IN HIS INDIVIDUAL NAME can not be enforced against the partnership, though made in consideration of property of which the firm had the benefit. *Holmes v. Burton*, 621.

See CO-TENANCY, 3.

PART PERFORMANCE.

1. PART PERFORMANCE OF A CONTRACT OF SERVICE will entitle to compensation, where entire performance has been prevented by sickness. *Greene v. Linton*, 707.
2. THE REMEDY, WHERE THERE HAS BEEN PART PERFORMANCE of a contract of service, is upon the contract itself, and not upon a *quantum meruit*. *Id.*
3. WHERE THERE HAS BEEN PART PERFORMANCE OF ONE OF TWO DEPENDENT COVENANTS, the party sought to be charged upon his covenant on account of such part performance may reduce the damages by showing the loss that he has incurred on account of there not having been entire performance. *Id.*

PATENTS.

1. UNLESS THE INVENTOR HAS PATENTED HIS MEDICINES, he has no cause of action against another who prepares the same kind of medicines and calls them by the same generic name, if he does not offer and sell them as the preparation of the inventor. *Thomson v. Winchester*, 135.
2. *IDEM.*—But if another puts up an inferior article, and sells it as the plaintiff's preparation, it is a fraud upon him, for which he may recover without proving special damage. *Id.*
3. INVENTOR, TO ENTITLE HIMSELF TO A PATENT, must give, in his specification, a true description of his invention, and state clearly and accurately what he claims as his invention. *Davis v. Bell*, 202.
4. AMBIGUITY IN ANY MATERIAL PART of such description will render the patent void. *Id.*
5. SPECIFICATION MUST STATE what is new and what is old, in such a manner as to show clearly what is claimed as a new invention, and if it seeks to cover more than is new, the patent will be void. *Id.*
6. ASSIGNMENT OF PARTICULAR INTEREST IN A PATENT RIGHT, or a conveyance of a right to use an invention in a limited territory, is not required to be recorded in the patent office. *Stevens v. Head*, 617.
7. VENDEE OF RIGHT TO USE A PATENTED INVENTION, who has not been disturbed in the exercise of such right, must show that the vendor had no right to convey, if he seeks to recover against him on the ground that there was no right conveyed. *Id.*

PAYMENTS.

- PAYMENTS VOLUNTARILY MADE WITH FULL KNOWLEDGE**, or means of knowledge, of all the facts in relation to the transaction, can not be recovered back. *Stevens v. Head*, 617.

PHYSICIANS.

See AGENCY, 7.

PLEADING AND PRACTICE.

1. PETITION IS THE PROPER MODE OF AFFECTING A FUND in equity, where no other parties are to be brought in to litigate the question than such as are or should have been parties to the original bill, though it is otherwise where additional parties are required. *Hays v. Miles*, 70.
2. THERE ARE TWO MODES OF ENFORCING FORFEITURE OF A CHARTER: by *scire facias* where a legally existing corporation has abused its powers, or by *quo warranto* where a *de facto* corporation has exercised the powers of a legal corporation. *Regents of the University of Maryland v. Williams*, 72.
3. A CORPORATION IS ENTITLED TO A FULL HEARING before judgment of dissolution is rendered. *Id.*
4. FOR ERROR IN REFUSING TO GIVE AN INSTRUCTION, the appellate court will not grant a reversal, if the appellant was not injured by such refusal. *Union Bank of Georgetown v. Planter's Bank of Prince George's County*, 113.
5. THE EXCEPTION OF MERCHANTS' ACCOUNTS in the statute of limitations must be pleaded to be taken advantage of. *Id.*
6. ANSWER TO BILL OF DISCOVERY, WHEN EVASIVE AND INSUFFICIENT.—Where a bill of discovery alleges that no consideration was given by the defendant for the property in dispute, an answer which merely alleges that a consideration was paid, without stating whose money it was, or by or for whom it was paid, is evasive, and exceptions thereto should be sustained. *Wilson v. Woodruff*, 194.
7. PLEA OF NUL DISSEISIN ADMITS that the tenant has disseised the demandant. *Gibson v. Brockway*, 200.
8. FINAL DECREE is one that disposes of the subject of litigation so far as the court is concerned. *Mills v. Hoag*, 271.
9. DECREE IS NONE THE LESS FINAL because further proceedings before the master are requisite to carry it into effect. *Id.*
10. VENDER OF THE INTEREST OF ONE OF THE PARTIES is not entitled to prosecute an appeal, although he proceeds in the name of his vendor; a transfer of the right of appeal is against public policy. *Id.*
11. COMPLAINANT'S ASSIGNEE can in no case proceed in the name of the original party, but must make himself a party by supplemental bill. *Id.*
12. APPEAL IN THE NAME OF A PARTY who has previously assigned all his interest must be dismissed. *Id.*
13. VARIANCE not objected to at the trial is not available on writ of error. *Driggs v. Dwight*, 283.
14. JOINT ACTION AGAINST SEPARATE OWNERS OF ANIMALS can not be sustained for damages inflicted by the joint act of such animals. *Van Steenburgh and Gray v. Tobias*, 310.
15. PLEADING STATUTE HAVING AN EXCEPTION.—Party who would bring himself within an exception must plead it; but if the exception forms no part of his cause of action, but merely an excuse for his adversary, the latter must plead it. *Per Senator Edwards. Bloodgood v. Mohawk and Hudson R. R. Co.*, 313.
16. ALLEGATION THAT A SALE WAS UNJUST, INIQUITOUS, and fraudulent, is

- impertinent, if not accompanied with a statement of the facts, showing wherein the fraud and iniquity consisted. *Baird v. Baird's Heirs*, 399.
17. WHERE PROOF HAS BEEN TAKEN IN AN EQUITY CASE, the plaintiff can not discontinue the suit with the right of bringing it anew, otherwise than by obtaining an order of the court, that the bill be dismissed without prejudice. *Heirs of French v. French et al.*, 441.
 18. COURT HAS NO RIGHT TO INSTRUCT THE JURY that the testimony proves a certain fact, although it may greatly preponderate in favor of that fact. *Trovillo v. Tilford*, 484.
 19. PLEA OF NON CEPIT IN REPLEVIN admits property in plaintiff, and takes issue on the caption and detention only. *Mackinley v. McGregor*, 522.
 20. CROSS-EXAMINATION OF WITNESSES can not be made available by a party to prove an affirmative before he has opened his case. *Id.*
 21. DEMURRER TO EVIDENCE admits every fact which the jury might properly infer from the evidence. *Id.*
 22. DEFENDANT CAN NOT PROVE THE LOSS OF A DEED, if the loss, if proved, would absolve him from liability in the action. *Morrow v. Campbell*, 704.
 23. DECLARATION WHICH DISCONTINUES THE SUIT against such defendants in the original writ as have not been served with process, is not demurrable, if the case it states could be sustained by proof of such a case as under the statute would authorize the discontinuance. *Gillaspie v. Wesson*, 715.
 24. LEGALITY OF A CONTRACT SET OUT IN A DECLARATION is not open to revision, if defendant has failed to demur. *Reid v. Edwards*, 720.
- See ARBITRATION AND AWARD, 1, 4; ATTORNEY AND CLIENT, 2, 3, 4; CONTRACTS, 8, 9, 11, 12; COVENANTS; DAMAGES, 2; ESTATES OF DECEDENTS, 1; LIBEL; MARRIED WOMEN, 6; MORTGAGES, 2; NEW TRIAL; WRIT OF ENTRY.

POSSESSION.

OWNER OF LAND, HAVING RIGHT TO IMMEDIATE POSSESSION, may forcibly expel an intruder, and his possession obtained by so doing is lawful. *Beecher v. Parmele*, 633.

See VENDOR AND VENDEE, 4, 5, 6.

POWERS.

1. A GENERAL POWER is a power to appoint whomsoever the donee pleases. *Thompson et al. v. Garwood et al.*, 502.
2. A PARTICULAR POWER is one by which the donee is restricted to particular objects. *Id.*
3. A POWER GENERAL IN TERMS will not be cut down to a particular power, unless an intent to do so is apparent from the instrument conferring the power. *Id.*
4. WILLS EXECUTED UNDER POWERS ARE CONSTRUED the same as proper wills, and are not affected by the instrument by which the power was conferred, except by the clause by which the power is created. *Id.*

See DEVISES, 8, 9.

PREFERENCE OF CREDITORS.

See ASSIGNMENTS, 1; BANKRUPTCY AND INSOLVENCY.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See CONSIDERATION, 2, 3; CONTRIBUTION.

PROBABLE CAUSE.

1. **WANT OF PROBABLE CAUSE** must be proved in order to sustain an action for malicious prosecution. *Griffis v. Sellars*, 422.
2. **PROBABLE CAUSE EXISTS** where the facts and circumstances are such that when communicated to the generality of men of ordinary and impartial minds, they will be sufficient to raise in them a belief or grave suspicion of the guilt of a person. *Id.*
3. **VERDICT OF CONVICTION FOLLOWED BY JUDGMENT** of the trial court is conclusive evidence of the existence of probable cause to warrant the prosecution, though the judgment of conviction is vacated on appeal. *Id.*

PROBATE COURTS.

1. **AUTHORITY OF PROBATE COURT TO GRANT LETTERS** of administration with the will annexed, is limited to the case where the executor refuses to render an account, or where he becomes insane. *Vick v. Mayor and Aldermen of Vicksburg*, 167.
2. **APPOINTMENT OF SUCH ADMINISTRATOR IS NULL AND VOID** where the act of appointment fails to state a case that gives jurisdiction to the court. *Id.*
3. **EXECUTOR CAN ONLY BE REMOVED BY THE PROBATE COURT'S GRANTING LETTERS**, *cum testamento annexo*, to another; the superior court has no power to remove an executor for any cause; and its judgment removing him is, therefore, void. *Id.*
4. **NOTICE MUST BE GIVEN, IN CASE OF PARTITION** among heirs and devisees, to all who do not join in the petition, or they will not be bound by the acts of the court. *Id.*
5. **JURISDICTION OF ORPHANS' COURT IN PROCEEDINGS FOR SALE OF REAL ESTATE** of a decedent is derived exclusively from legislation, and its acts are, unless warranted by statute, *coram non judice*. *Wyman v. Campbell*, 677.
6. **PROCEEDINGS OF ORPHANS' COURT RELATING TO SALES OF REALTY ARE IN REM** against the decedent's estate, and not *in personam*; and the real estate itself becomes subject to the action of the court, for the purposes of a sale, as soon as it has obtained information of facts sufficient to give it jurisdiction. *Id.*
7. **ORPHANS' COURT ACQUIRES POTENTIAL JURISDICTION** over the sale of a decedent's estate, by the death of the ancestor, and this jurisdiction becomes actual as soon as the court undertakes to act upon a report of commissioners, which shows that a division of the real estate can not be equitably made without injury to the heirs. *Id.*
8. **ORDERS OF ORPHANS' COURT ARE CONCLUSIVE**, until reversed by a higher tribunal, unless they are founded in a usurpation of power; and such orders are not rendered void by the existence in the record of errors or irregularities which would authorize their reversal by a revising court. *Id.*

See ESTATES OF DECEDENTS, 2.

PROCESS.

See ARREST; OFFICE AND OFFICERS, 1.

QUANTUM MERUIT.

See PART PERFORMANCE, 2.

RAILROADS.

See EMINENT DOMAIN, 1, 4.

REAL ESTATE.

1. DEVISE OF ONE ROOM IN A HOUSE is a devise of real estate. *White v. White*, 232.
2. WHERE PARTIES CLAIM UNDER COMMON SOURCE of title, neither can impeach the title of the common ancestor. *Doe, Lessee of Foster, v. Executors of Dugan*, 432.
3. WHEN A PERSON CONVEYS LAND in which he has no interest at the time, but afterwards acquires a title thereto, he will not be permitted to claim in opposition to his deed from the grantee, or any person claiming under him. *Brown v. McCormick*, 450.

RECEIPTORS.

See ATTACHMENTS, 2, 3; LEVY.

RECORDING.

MARGINAL NOTES OF A RECORDER appended to the record of a deed can not affect its validity, nor are they proof of the facts set forth therein. *Doe, Lessee of Foster, v. Executors of Dugan*, 432.

See BONA FIDE PURCHASERS, 2, 3.

RELATION.

See ACKNOWLEDGMENT.

REMAINDERS AND REVERSIONS.

1. ESTATE IN REMAINDER NOT EXTINGUISHED BY SALE IN PARTITION, WHEN. Where tenant for life obtains under proceedings in partition, in which the remainder is not represented, the interests in fee of other owners in the estate, upon payment to them of their share of the valuation of the property, and thereupon receives a deed purporting to convey, in addition to the interests which he has acquired by purchase of the fee in which he holds the particular estate, the remainder is not determined, but goes, upon his death, to the persons entitled. *Doe, Lessee of Foster, v. Executors of Dugan*, 432.
2. ESTATE IN REMAINDER IN THE PERSONAL PROPERTY THAT SHALL BE LEFT at the determination of a life estate, the tenant of which enjoys an absolute power of disposal, is void. *Davis v. Richardson*, 581.
3. REVERSIONARY OWNER OF A CHATTEL has no right of action, because of an injury done to the particular estate. *Steele v. Williams*, 548.
4. TRESPASS WILL NOT LIE FOR THE REVERSIONARY OWNER OF A CHATTEL, for its seizure on execution as the property of the owner of the particular estate. *Bell v. Monahan*, 548.

See TROVER, 3.

RENT.

See LANDLORD AND TENANT, 1, 2, 4, 5.

REPLEVIN.

See AGENCY, 6; ATTACHMENTS, 2; PLEADING AND PRACTICE, 19.

RESCISSION.

1. RESCISSION WILL NOT BE DECREED in favor of the grantor of a conveyance executed by him to defraud his creditors. *James v. Bird's Adm'r*, 663.
2. AGREEMENT THAT A CONTRACT MAY BE RESCINDED by a return of the deed by which it is evidenced by a certain day, can not, if the deed be lost, be fulfilled by the grantee's informing the grantor thereof, and further, that he renounces the benefit of the contract. *Morrow v. Campbell*, 704.

RESTRAINT OF TRADE.

- A BOND IS IN RESTRAINT OF TRADE AND VOID if it excludes the obligor from engaging in the trade of iron founder everywhere and for all time. *Alger v. Thacher*, 119.

RETURN.

1. RETURN OF AN EXECUTION, showing advertisement of sale three weeks before the time of sale, instead of the day of sale, shows a sufficient notice. *Chase v. Merrimack Bank*, 163.
2. AMENDMENT OF A RETURN to show that a copy of the execution had been left with one having property of the debtor, will be permitted, it having been satisfactorily proved that such was the fact. *Id.*

SALES.

1. SALE OF CHATTELS IS NOT CONDITIONAL where an absolute bill of sale is given acknowledging payment at a stipulated price, although it is provided that in case the vendee sells for more than a specified sum, the vendor is to have the overplus after deducting expenses of sale, and that the vendor is to transport the property to a certain place, free of expense to the vendee. *Jewett v. Lincoln*, 36.
2. SALE IS CONSUMMATED IN SUCH A CASE as between the parties, by designating and setting apart the articles for the vendee from the mass of which they are a part. *Id.*
3. OF TWO PURCHASERS CLAIMING UNDER BILLS OF SALE EQUALLY VALID, the one first lawfully acquiring possession takes the title. *Id.*
4. MARKING OF SHINGLES WITH THE INITIALS OF THE PURCHASER under a bill of sale for a specified quantity out of a larger mass, is evidence of a delivery of possession to go to the jury. *Id.*
5. VENDOR MAY ELECT TO CONSIDER CONTRACT AT AN END if vendee disavows all property in the goods and refuses to pay for them. *Mackinley v. McGregor*, 522.

See CONDITIONAL SALES; EVIDENCE, 3; FRAUDULENT CONVEYANCES, 1, 3, 4, 5; LIENS, 2, 4.

SCHOOLMASTER.

1. SCHOOLMASTER'S AUTHORITY EXTENDS TO THE INFLICTION of corporal punishment upon his pupils, subject to the qualification that he may not

inflict punishment of a nature to produce lasting injury to body or health. *State v. Pendergrass*, 416.

2. **SCHOOLMASTER ACTS JUDICIALLY** in determining the necessity of punishment, and the extent to which it should be administered, and will be liable only when he punishes under pretext of authority, to gratify malicious feelings. *Id.*

SET-OFF.

1. **SET-OFF FOR MONEY ADVANCED** is available in chancery as against a bond and mortgage on which suit is brought, and a cross-bill is not necessary for its assertion. *Chapman v. Robertson et al.*, 264.
2. **SET-OFF, WHAT CAN NOT BE MADE SUBJECT OF.**—Uncertain damages arising on a breach of contract can not be made the subject of a set-off, either in a court of law or equity. *Dugan v. Cureton*, 727.

SHERIFFS.

FOR LOSS OF ATTACHED GOODS in the keeping of a bailee of the plaintiff's nomination, the sheriff is not liable. *Donham v. Wild*, 161.

See **ACKNOWLEDGMENT**; **COVENANTS**, 2; **JUDGMENTS**, 8, 9.

SHERIFFS' DEEDS.

1. **PRESUMPTION OF EXECUTION OF SHERIFF'S DEED, WHEN RAISED.**—Where an execution sale is shown, and it also appears that an order of confirmation was entered, and the testimony of the sheriff is offered to the point that from his uniform habit in such cases he is certain that he must have executed the deed properly, there will, in case the deed itself can not be produced, be a presumption raised that it was executed in due form. *Lessee of Armstrong v. McCoy*, 435.
2. **RECITALS IN A SHERIFF'S DEED** need only show that he acted under the authority of an execution. *Id.*
3. **STATUTE PROVIDING FOR RECITAL** of all executions issued upon a judgment, in the sheriff's deed, is merely declaratory in so far as it requires further recitals than are necessary to show the sheriff's authority. *Id.*

SHERIFFS' SALES.

1. **SHERIFF PURSUES THE EXIGENCY OF HIS WRIT** of *fi. fa.* or *vend. ex.*, by selling at public sale, and if he is guilty of no fraud or neglect in relation to such, he is not answerable to the plaintiff, although the property sold may have brought an inadequate price. *Lynch v. Commonwealth*, 490.
2. **A GROSSLY INADEQUATE PRICE** may be evidence of fraud or neglect in relation to such sale, but it does not, *per se*, give the plaintiff a right of action. *Id.*
3. **TITLE OF PURCHASER AT SHERIFF'S SALE** IS NOT AFFECTED by the fact that the sheriff had an interest in the judgment, where such interest did not appear of record, and was unknown to the purchaser. *Boren v. McGhee*, 695.

SHIPPING.

See **AGENCY**, 3, 4, 5; **COMMON CARRIERS**, 5, 6, 7, 8, 9, 10, 11.

SLANDER.

See **LIBEL**.

SPECIFIC PERFORMANCE.

PERFORMANCE OF A CONDITION PRECEDENT, such as the payment of money at a time designated, may be made essential to the existence of the right to specific performance. *Wells v. Smith*, 274.

See GIFTS, 3.

STATUTES.

FORMER STATUTE IS NOT REPEALED BY ENACTMENT OF LATER ONE on the same subject, when both may operate together. *Wyman v. Campbell*, 677.

See CONSTITUTIONAL LAW; CORPORATIONS, 5, 14, 15, 16, 19; EMINENT DOMAIN, 5; GRANTS; OFFICE AND OFFICERS, 3.

STATUTE OF FRAUDS.

1. **AN AGREEMENT CAPABLE OF BEING PERFORMED** within a year, is not within the statute of frauds, although it be not actually performed till after that time. *Peters v. Westborough*, 142.
2. **AN AGREEMENT TO BE PERFORMED UPON A CONTINGENCY** which may arise during a year, is not within the statute. *Id.*
3. **AN AGREEMENT WHICH BY ITS TERMS IS NOT TO BE PERFORMED WITHIN A YEAR**, is within the statute, although it might be partly performed within the year. *Id.*
4. **A PAROL AGREEMENT TO SUPPORT** a person for a number of years, is not within the statute, for had the person died within the year, the contract would have been performed. *Id.*
5. **PROMISE TO PAY THE DEBT OF ANOTHER**, if the original debtor still remains liable, is collateral, and within the statute of frauds; but if the original debtor is discharged, the promise to pay is an independent contract, and need not be proved to be in writing. *Anderson v. Davis*, 612.
6. **ORIGINAL DEBTOR IS NOT A COMPETENT WITNESS FOR THE PLAINTIFF** to prove that the promise to pay was an independent contract, and not collateral. *Id.*

STATUTE OF LIMITATIONS.

1. **THE STATUTE OF LIMITATIONS COMMENCES TO RUN** in favor of a suspended bank and against its depositors, not from the time transactions between them terminated, but from the time the suspension was made known to them. *Union Bank of Georgetown v. Planters' Bank of Prince George's County*, 113.
2. **STATUTE OF LIMITATIONS IS NOT A BAR** to the recovery of a distributive share of personal estate to which a person is entitled under the intestate law. *Patterson v. Nichol*, 473.
3. **MERE IGNORANCE OF HIS CAUSE OF ACTION** on the part of a plaintiff does not prevent the operation of the rule that the statute of limitations begins to run from the time when the cause of action accrues. *Smith v. Bishop*, 607.
4. **ACTION IS BARRED IN A CASE WHERE THE CAUSE OF ACTION IS PERFECTED**, and the statute of limitations has subsequently run, although the party may have been ignorant of his cause of action, and that ignorance may have resulted from the character of the original fraud in the transaction, or from the manner in which it may have been perpetrated. *Id.*

SUBROGATION.

1. SURETIES, OR PERSONS STANDING IN THE RELATION OF SURETIES, are entitled to be subrogated to the rights and liens of creditors whose debts they have discharged. *Eddy v. Traver et al.*, 261.
2. CREDITOR HAVING RIGHT TO RESORT TO TWO FUNDS, and electing to resort to that which, in equity, is only secondarily liable, another person having a claim on such secondary fund, is treated as a surety, and is entitled to take the place of the creditor with respect to the primary fund. *Id.*
3. PURCHASER WITH A WARRANTY FROM AN HEIR of realty, which is afterwards sold by order of the surrogate to pay the debts of the ancestor, is entitled to be subrogated to the rights of the creditors who are paid by such sale, and has an equitable lien on the rest of the estate remaining in the hands of the heir. *Id.*

SUNDAY.

1. AT COMMON LAW, THE MAKING OF A CONTRACT or the giving of a bill on Sunday was not prohibited, and was therefore not void on that account. *Kepner v. Keefer*, 460.
2. UNDER THE STATUTE OF APRIL 22, 1794 (Purd. Dig. 927), a note or bill executed on Sunday in Pennsylvania is void. *Id.*
3. WHERE THE CONSIDERATION OF A NOTE executed on Sunday is a contract entered into on the day previous, the plaintiff, to be entitled to recover, must sue upon the contract, and not upon the note. *Id.*
4. A NOTE EXECUTED UPON SUNDAY is not *per se* any evidence that there was a contract made on the day previous, and without other evidence it is error to submit that fact to the determination of the jury. *Id.*

SURETIES.

RELEASE OF SURETIES WHO HAVE SIGNED AS JOINT OBLIGORS is not effected, at law, by anything short of what amounts to a release or discharge of all the parties to the bond. Thus, where a bond for the payment of money was without interest, a separate agreement by the principal, subsequently entered into under seal, that the amount of the bond should bear interest, does not avoid the liability of the sureties. *Tremper v. Hemphill*, 673.

See CONSIDERATION, 2, 3; CONTRIBUTION; SUBROGATION, 1.

SURPRISE.

See EQUITY, 3.

TENANTS IN COMMON.

See CO-TENANCY.

TIME.

See CONTRACTS, 6, 7.

TOWNS.

See EXECUTIONS, 1, 2, 3.

TRESPASS.

PARTY IN POSSESSION OF LAND MAY MAINTAIN TRESPASS against a stranger for cutting trees thereon, though he has conveyed to a third person who has never entered into possession. *Hayward v. Sedgley*, 64.

See **FEROCIOUS ANIMALS**; **INNKEEPERS**, 4; **LEVY**, 2; **REMAINDERS AND REVERSIONS**, 4.

TROVER.

1. **TROVER WILL NOT LIE TO RECOVER** the possession of personal property which the plaintiff has parted with for the purpose of defrauding his creditors. *Stewart v. Kearney*, 482.
2. **PERSONAL REPRESENTATIVES** of such a person may, after his death, maintain such an action for the benefit of his creditors if his estate be otherwise insufficient to pay his debts. *Id.*
3. **TROVER WILL NOT LIE FOR THE OWNER OF THE REVERSIONARY ESTATE** in a chattel, prior to the determination of the particular estate. *Steele v. Williams*, 546.

TRUSTS AND TRUSTEES.

1. **TRUST CREATED FOR THE BENEFIT OF A THIRD PERSON**, without his knowledge at the time, may be afterwards affirmed and enforced by him. *Woodbury v. Bowman*, 40.
2. **ONE OBTAINING AS ASSUMED PROTECTOR** of certain illegitimate children, a compromise in their favor, and as the result of such compromise, a conveyance to himself of certain real estate, can not claim that the children had no interest in the property, and that he holds it discharged of the trust. *Sweet v. Jacocks*, 252.
3. **ONE WHO UNDERTAKES TO ACT AS AGENT** for another, can not be permitted to acquire the property for his own benefit; and, on taking a conveyance in his own name, will be adjudged to hold it in trust for his principal. *Id.*
4. **A TRUSTEE APPOINTED BY THE COURT OF ANOTHER STATE** in the place of a deceased trustee to whom land in Pennsylvania has been conveyed, obtains no title to the land so as to enable him to maintain ejectment for it. *Williams v. Maus*, 465.
5. **TRUSTS, DISCRETIONARY AND DIRECTORY.**—Trusts with respect to funds created by will for distribution at a future period, are either discretionary or directory. Discretionary, where no directions are given as to the manner in which the fund shall be invested prior to its final appropriation in satisfaction of the trust. Directory, where the manner in which the fund shall be invested is pointed out. *Deaderick v. Cantrell*, 576.
6. **JOINT TRUSTEE OF A DISCRETIONARY TRUST** is liable for the misapplication of the trust fund by his co-trustee, where it is through his instrumentality that the fund has been obtained by such co-trustee, or where the wasting of the fund has been enabled by some act of his amounting to gross negligence. Thus, where notes representing a trust fund were payable to two trustees jointly, the permitting by the one of the reception of their entire amount by the other, will render the former liable for the conduct of the latter. *Id.*
7. **JOINT TRUSTEE PERMITTING HIS CO-TRUSTEE TO RETAIN** the trust fund for many years, without inquiry as to whether it has been invested so as to

answer the purposes of the trust, will be liable, because of his neglect, for the conduct of his co-trustee. *Id.*

8. JOINT TRUSTEE OF A DIRECTORY TRUST failing to see that the trust fund is invested in the manner pointed out, is liable for the abuse of the trust by his co-trustee. *Id.*
9. ASSENT OF THE CESTUI QUE TRUST TO A TRUST created in his favor will be presumed, and therefore the estate vested in his trustee is not overreached by the lien of a judgment obtained against the grantor, intermediate the creation of the trust estate, and the acts of the beneficiary indicating his assent to the trust. *Skipwith v. Cunningham*, 642.
10. TRUST CREATED UPON THE VESTING OF THE LEGAL TITLE in the trustee, can not be destroyed otherwise than by the renunciation of the *cestui que trust*. *Id.*

USAGE.

1. WHERE IT WAS THE USAGE among banks to give a notification of any objection to an account rendered by one to the other, if no objection is made to an account, a reasonable inference arises of its correctness. *Union Bank of Georgetown v. Planters' Bank of Prince George's County*, 113.
2. THAT THE BANK RECEIVING THE ACCOUNT has suspended makes no difference in such case, it being engaged in settling up its affairs. *Id.*
See COMMON CARRIERS, 2, 4, 10.

USURY.

See CONFLICT OF LAWS, 5.

VENDOR AND VENDEE.

1. WHERE PURCHASER OF LAND AGREES TO PAY THE PURCHASE MONEY, upon the vendor's delivering to him United States patents therefor, such vendor can not enforce payment, before performing the condition precedent, although congress may, subsequently to the making of the agreement, have passed an act which rendered the delivery of such patents unnecessary or impracticable. *Chouteau v. Russell*, 191.
2. VENDOR NEED NOT PREPARE AND TENDER DEED as condition precedent to forfeiture of contract of sale, for non-payment of purchase money. If the purchaser wishes to comply with his contract, he must offer to pay. *Wells v. Smith*, 274.
3. PURCHASER OF LAND, KNOWING THE TITLE TO BE DEFECTIVE, buys at his own risk, and he is not entitled to compensation for improvements placed upon it from the rightful owner, who seeks to recover the land in ejectment, although the latter may have known that the improvements were being made, and made no objection. *Walker v. Quigg*, 452.
4. ONE WHO GOES INTO POSSESSION UNDER ANOTHER, or acknowledging the title of another, can not be heard to dispute the title of that other, during the continuance of the relation. This principle extends to one who acquires possession under a contract of sale. *Greeno v. Munson*, 605.
5. PURCHASER WHO GOES INTO POSSESSION UNDER CONTRACT OF SALE can not set up any outstanding title which he may have purchased in, unless he first make a *bona fide* surrender of the possession, and bring his action to try that title. *Id.*

6. POSSESSION COMMENCED UNDER CONTRACT OF SALE IS NOT ADVERSE in any sense; nor can the vendee, or any one claiming under him, ever acquire title by the statute of limitations, until he has, *bona fide*, surrendered his possession, or by some unequivocal act repudiated the contract, and this is known to the vendor. *Id.*

VOLUNTARY CONVEYANCES.

DEFECTS IN A VOLUNTARY INSTRUMENT will not be aided in favor of collateral relations, to the prejudice of the wife. *Gilmore v. Whitesides*, 563.

WAGERS.

See GAMING.

WARRANT OF ARREST.

See ARREST.

WILLS.

1. A WILL OF PERSONAL PROPERTY must be executed according to the law of the domicile of the testator at the time of his death. *McCune v. House*, 438.
 2. A NUNCUPATIVE WILL CAN NOT REVOKE a prior written will or testament. *Id.*
 3. INSTRUMENT, IN FORM A DEED, IS A WILL, where the property that it purports to convey is an undivided interest in that of which the grantor shall die seised. *Watkins v. Dean*, 583.
 4. RENUNCIATION OF A HUSBAND'S WILL BY THE WIDOW, to entitle her to claim as in case of intestacy, must be in strict compliance with the terms of the statute, and is not therefore sufficiently expressed by the institution of a suit claiming title to property devised, by title paramount to the will. *Kinnaird v. Williams*, 658.
- See DEVISES; ESTATES OF DECEDENTS, 4; EXECUTORS AND ADMINISTRATORS; LEGACIES AND LEGATEES; POWERS, 4; PROBATE COURTS, 1, 2, 3, 4.

WITNESSES.

1. MEMBERS OF A BRIDGE CORPORATION ARE NOT COMPETENT WITNESSES for the corporation in an action against it for an injury caused by defects in the bridge. *Watson v. Proprietors of Lisbon Bridge*, 49.
 2. WITNESSES.—If several have agreed in the event of recovery to share the proceeds, neither is competent as a witness. *Mackinley v. McGregor*, 522.
- See EVIDENCE, 1; STATUTE OF FRAUDS, 6.

WRIT OF ENTRY.

TENANT, IN WRIT OF ENTRY, can not disprove demandant's actual seisin of the demanded premises, by showing title in a third person under whom he does not claim. *Proprietors of Enfield v. Permit*, 207.

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